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International Court of Justice

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OFFICIAL TRANSCRIPT OF THE INTERNATIONAL MILITARY TRIBUNAL IN THE MATTER OF THE UNITED STATES OF AMERICA, THE FRENCH REPUBLIC, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, AND THE UNION OF SOVIET SOCIALIST REPUBLICS AGAINST HERMANN WILHELM GOERING ET AL, DEFENDANTS, SITTING AT NURNBERG, GERMANY, ON 4 JULY 1946, 1000-1700, LORD JUSTICE LAWRENCE PRESIDING.

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THE PRESIDENT: Dr. Sauter.

DR. SAUTER (Counsel for the defendant Funk) : If you please, sir.

THE PRESIDENT: The Tribunal has received your letter of the 17th of June of this year signed by the defendant Walter Funk.

DR. SAUTER: Yes.

THE PRESIDENT: The Tribunal proposes to take notice of that, and if you will read it, it will then become a part of the record.

DR. SAUTER: Yes; but, Mr. President, at the moment I do not have the letter with me.

THE PRESIDENT: The Tribunal would wish you to do it at two o'clock, then, to read that letter.

DR. SAUTER: Very well, Mr. President. Thank you very much.

THE PRESIDENT: The same observation applies to Dr. Exner's letter of the 23rd of June, 1946, on behalf of the defendant Jodl; only the Tribunal thinks that that letter also should be signed by the defendant and read by Dr. Exner at two o'clock. I will call on Dr. Jahrreiss.

DR. JAHRREISS (Counsel for the defendant Jodl): Mr. President and gentlemen of the Tribunal, the main juridical and fundamental question of this trial concerns war, which is forbidden by International law, the breach of peace as treason to the world constitution.

It overshadows all other juridical questions. The four chief prosecutors discussed this problem in their opening speeches, sometimes as the central probelm of their presentation, sometimes as a fundamental problem and indeed not without looking at it from different perspectives.

Counsel for the defence has to exqmine it now. From among the defence counsel, I have been asked to conduct this examination. It is true that it remains for every counsel to decide if and to what extent he feels himself in a position, as a result of my arguments, to renounce his own presentation

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of the question of the breach of the peace! But I have reason to believe th this possibility will be used to such an extent that the intention of the counsel for the defence, considerably to simplify technically that part of the trial which is now beginning, will be realized by my speech.

I have to deal here only with the juridical question and not with the evaluation of the hearing of evidence which has lasted for months. And I am also dealing only with the question of such law as is at present valid, not with the question of such law as could or should be demanded in the name of ethics or of human progress.

I have a purely scientific task to fulfil, Science wants nothing but the truth, knowing full well that its goal can never be completely attained and that its path is therefore without end.

I wish to thank the Secretary General of the Tribunal for having placed at my disposal the documents of a decisive nature and very important literature. Without this chivalrous assistance, it would not have been possible, under the present conditions in Germany, to complete my work. This literature accessible to me was published prodominantly in the United States. Knowing the vast French and English technical literature on this subject which I have studied during the last quarter of a century -I am unfortunately not conversant with the Russian language- I believe, however, that I can fairly say that no important idea is overlooked, because in no other country of the world has the discussion of our problem, which has become the great problem of humanity, been more comprehensive and more fundamental than in the United States.

It was this fact that enabled me to forego the use of the scientific literature published in the former German sphere of control. In this way even the semblance of a pro domo line of argumentation will be avoided.

Because of the short time at my disposal for this speech

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and, at the same time, owing to the abundance and difficulty of the problems with which I have to deal, it is not possible to read here the documents and quotations which I am using. I shall present only a few sentences. Any other procedure would interrupt the line of argumentation for the listener. I, therefore, submit to the Tribunal the documents and references to books in appendices to my juridical arguments. In this way, what I say can be quickly verified today, tomorrow and thereafter.

The Charter threatens individuals with punishments for breach of the peace between states.

And it appears that the Tribunal accepts the Charter as the unquestionable basis for all juridical considerations.

This means that the Tribunal does not examine the question whether the Charter is, as a whole or in parts, open to juridical objections a question which nevertheless remains open.

If this is so:

Why then make any statements at all here on the great fundamental legal questions?

The British Chief Prosecutor even made it the central theme of his great address to examine the relationship of the Charter, where our question is concerned, to the international public law at present valid. He justified the necessity of his arguments as follows: It is the task of this Tribunal to serve humanity, and this task could only be fulfilled by the trial if the Charter was consistent with International Law, that is, if the punishment of individuals for breach of the peace between states was founded in the International Law at present valid.

It is, indeed, necessary to clarify whether certain stipulations of the Charter may have created new laws and consequently laws with retroactive force.

Such a clarification is not carried out here in order to save historical research students work. They will examine this, just as they will all the other findings in this trial, according to

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the rules of free science, perhaps through many years of work and certainly without limiting the ground covered by the questions and, if possible, on the basis of an incomparably greater quantity of documents and evidence.

Such a clarification is indispensable, simply for the reason that the decision as to right and wrong depends, or may depend, upon it, particularly if the Charter is considered legally unassail able.

Let us assume that it were thus: The Charter does not formulate criminal law which is already valid, but creates new and, therefore, retroactive criminal law. What does this signify for the verdict? Must this not be important for the question of guilt?

Perhaps the retroactive law which, for instance, penalizes aggressive war was not already fixed in the conscience of humanity at the time when the act was committed, nor was the ground even simply prepared for it there. Then the defendant cannot be guilty in the sense that he was aware of the wrongfulness of his behaviour, not before himself nor before others.

Or the retroactive law was perhaps promulgated at a time when a new conscience was just beginning to take shape but was still not clear or not general. It is then in any case possible that the defendant is not guilty in the sense that he was aware of the wrong fulness of his commissions and omissions.

At any rate, from the point of view of continental European thought on penal law, the fact that a person was not aware of doing wrong is a point which the Tribunal must not overlook.

Now the question as to whether the penal law contained in the Charter is ex post facto penal law does not present any difficulties if the stipulations of the Charter are unequivocal and the prescriptions of International Law to date are uncontested.

But what if we have regulations capable of several interpretations before us, or if the rules of International Law are the subject of controversy?

Let us take the first: A stipulation of the Charter

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is ambiguous and therefore needs interpreting. According to one interpretation which can be justified, the stipulation appears to be an ex post facto law, according to another, which can be equally well justified, it does not.

Let us take the second : The regulation is clear or has been clarified by the interpretation of the courts but experts on International Law are of different opinions on the legal position to date : It is not certain whether we have not got an ex post facto law before us.

In both cases it is relevant whether the defendant was conscious of the wrongfulness of his behaviour.

I intend to elucidate how important these considerations are in this trial.

I shall now begin the examination.

The starting points of the British and French Chief Prosecutors are fundamentally different.

The British Chief Prosecutor argued as follows, if I understood him correctly :

1) The unrestricted right of states to wage war was partly eliminated by the League of Nations Covenant and later fundamentally by the Briand-Kellogg Pact, which is the core of the world peace order which still continues to be equally valid today. War which is prohibits is a punishable violation of law within and towards the community of nations.

And the individual who has acted in a responsible position is punishable.

2) The indictment of individuals for breach of the peace is, indeed, something new, but not only morally demanded, but also long overdue in the course of legal developments; in fact it is simply the logical consequence of the new legal position. The Charter only appears to create new law,

And if I understood the British Chief Prosecutor correctly, he asserts :

Since the conclusion of the Pact of Paris, there is a clear legal situation, based on the whole world's uniform convictions as to what is right. Since 1927 the United States have negotiated, first with France, then with the remaining Great Powers, with the exception of the Soviet Union, and with some of the smaller powers, concerning the conclusion of a treaty intended to abolish war. Secretary of State Kellogg stated with memorable insistence what the government in Washington was triving for, namely :

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The powers should renounce war as an instrument of national policy and this without legal definitions from a practical point of view, with purity and simplicity, unequivocally and without qualifications or reservations. For otherwise the object desired could not be attained :

To abolish war as an institution, i.a. as an institution of international law.

After the negotiations had been concluded, Aristide Briand, the other of the two statesmen,

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from whose initiative the pact, which in Germany is often called the pact to outlaw war (Kriegsaechtungspakt), springs, declared when it was signed in (9)
Paris:

"Formerly deemed a divine right and remaining in international law as a prerogative of sovereignty, such a war has now at last been legally stripped of that which constituted its greatest danger: its illegality. Branded henceforth as illegal, it is truly outlawed by agreement....."

According to the conception of both leading statesmen, the Paris Pact meant a change of the world-order at its very roots, if only all or almost all the nations of the world, and particularly all the Great Powers, signed the pact or adhered to it later on, as did actually happen.

The change is supposed to be the following:

Up to the time of the Briand-Kellogg Pact, war had been an institution of international law.

Since the Briand-Kellogg Pact war was high treason against the order created by international law.

Many politicians and scholars all over the world shared this conception. It is the definite basic conception of the unique commentary on the League of Nations Covenant by which Jean Ray influenced far beyond the borders of Franco, the practical and theoretical proponents of the idea of preventing (10)
war.

It is also the basic conception of the Indictment at Nurnberg.

Diplomacy and the science of international law found their way back into the old tracks after the first World War after a shock from which they recovered remarkably quickly. This to the horror of those who wanted to see the consequences - all the consequences - drawn from the catastrophe.

Mankind had a "grand vision of world peace" then, as Senator Bruce called it when the Pact of Paris was before the Senate for ratification. I know how much the personality and the achievements of Woodrow Wilson are a subject of dispute.

But the more detachment we achieve, the clearer it becomes that he - by making happy use of his own preparatory work and that of others - finally (12)
conceived and presented to the humanity of the time an entirely brilliant train of thought which is as right today as it was then and which can best be

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condensed as follows:

It is necessary to start afresh. The tragic chain of wars and mere armistices which are called peace must be broken.

For once humanity must have the insight and the will to pass from war to real peace i.e. to peace which is good in its essence - on existing legal foundations, without regard to victory or defeat; and this peace which is good in its essence must be maintained - and maintained in good condition - by and organised union of States.

These aims can only be achieved if the most frequent casuses of war, namely excessive armaments, secret treaties and the consecration of the status quo as a result of the lack of insight of the current owner - a consecration which is harmful to vital needs - are eliminated.

Humanity did not follow this path .. And it is not to be wondered at that amongst those who fought against the instruments of Versailles, St. Germain, Trianon, Neuilly and Sevres, be it in the camp of the vanquished or in that of the victors, were the very ones who strove after real, lasting peace.

When the governments

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of the South African Union and Canada, in their replies to Secretary of State Hull's principles of enduring peace of the 16th July 1937, indicated in unusuall strong words that an alteration of unjust, imposed treaties was an indispensable precondition for real world peace, they followed one of the fundamental views of the great American president.

Humanity did not follow Wilson.

For the members of the League of Nations, too, war remained a means for settling disputes prohibited only in individual cases, but normal on the whole. So said Jean Ray as late as 1930. The League of Nations did not prove to be a guide to the true order of Peace, indeed it did not even prove to be a sufficient brake on a complete backsliding into the old state. For, in fact, the world slid back entirely.

This is then the all-decisive fact in our problem of law. Before the commencement of the second World War the whole system of collective security, even in the scanty beginnings it had made, had collapsed, and this collapse was acknowledged and declared expressly, or shown by unambiguous actions, by three world powers - and, in fact, declared with full justification:

Great Britain expressly stated this at the beginning of the war to the League of Nations. I shall show this.

The Soviet Union treated the German-Polish conflict simply according to the rules of classic international law concerning debellatio. I shall explain this.

The United States declared their strict neutrality. I shall explain the import of this declaration.

The system of collective security has been much disputed over. In this question of the world's conscience, which is also of fundamental importance in this trial, it cannot be a matter of indifference that this system, rightly or wrongly, appeared in 1938 to such a prominent specialist on International Law as the American, Edwin Borchard, as absolutely inimical to peace and as the child of the hysteria of our age; and the collapse may have had various causes; it is certain that the above-mentioned three world powers testified at the beginning of September 1939 to the collapse - the complete collapse - and that they did not in fact do this as a consequence of the German-Polish war.

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1) On the 7 September 1939 the British Foreign Office told the Secretary-General of the League of Nations:

The British Government had assumed the obligation on the 5 February 1930 to appear before the Permanent International Court of Justice at the Hague whenever an action is brought against Great Britain, i.e. also in the case of actions which other states might bring on account of conduct by which Great Britain had, in the opinion of the plaintiff, violated international law during a war. The British government had accepted this regulation because it had relied on the machinery of collective security created by the League of Nations Covenant and the Pact of Paris functioning: because, if it did function - and as England would of course not conduct any forbidden wars and her opponent would on the contrary be the aggressor - a collision between England and those states that were faithful to the security machinery could not possibly be caused by the actions of British seapower. However the British government had been disappointed in what it relied on: Ever since the League Assembly of 1938, it had no longer been possible to doubt that the security machinery would not function: on the contrary, it had in fact collapsed completely: a number of members of the League had already declared their strict neutrality before the outbreak of war:

"The entire machinery intended to maintain peace has broken down."

I shall still have to show how right the British government was in the conclusions it drew. It should not be forgotten that the British Premier, Neville Chamberlain, had already proclaimed on the 22 February 1938 in the House of Commons, i.e. before the so-called Austrian Anschluss, the complete inefficiency of the system of collective security. He said:

"At the last election it was still possible to hope that the League might afford collective security. I believed it myself. I do not believe it now. I would say more: If I am right, as I am confident I am, in saying that the League as constituted today is unable to provide collective security for anybody, then I say we must not delude ourselves, and, still more, we must not try to delude small weak nations into thinking that they will be protected by the League against aggression and acting accordingly, when we know that nothing of the kind can be expected."

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The Geneva League of Nations was "neutralized", as NOEL BAKER expressed it later in the House of Commons.

2) In view of the correct conclusions drawn by the British government in their Note of 7 September 1939 to the League of Nations, it is no wonder if the Soviet Union treated the German-Polish conflict in accordance with the old rules of power politics. In the German-Russian Frontier and Friendship Pact of 28 September 1939 and in the declaration made on the same day in common with the Reich government, the government of Moscow starts from the conception of the debellatio of Poland, i.e. the abolition of Poland's government and armed forces. There is no mention made of the Pact of Paris or the League of Nations Covenant. The Soviet Union notes the abolition of the Polish state machinery by means of war, and draws from this fact the conclusions which seem right to her, agreeing with the Reich government that the new order of things is exclusively a matter for the two powers.

It was therefore only logical when, in the Finnish conflict of the winter of 1939/1930, the Soviet Union took up its stand on classic international law. It disregarded the reactions of the League of Nations, when, without even considering the application of the machinery of sanctions and only appearing to apply an article of the Covenant which was intended quite differently, it resolve that the Soviet Union had, as an aggressor, excluded itself from the League. The report of the Swiss Federal Council of the 30 January 1940 to the Federal Assembly tries to save the fact of the League which has been excluded from political realities.

3) The President of the United States stated on 5 September 1939 that there existed a state of war between several states with whom the United States lived in peace and friendship, namely Germany on the one hand and Great Britain, France , Poland, India and two of the British Dominions on the other hand. Everyone in the United States was bound to obey the neutrality regulations most strictly.

From the time of the preliminary negotiations, it was known in the United States that Europe, and particularly Great Britain and France, saw the main value of the pact outlawing war in the fact that the United States would take action in case of a breach of the pact. The British Foreign Minister stated

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this on 30 August 1928, i.e. four weeks previous to the signing of the pact. During the deliberations of the American Senate on the ratification of the pact, Senator Moses particularly drew attention to this. Senator Borah affirmed at the time that it was completely impossible to imagine that the United States would calmly stand by. After the discredited failures of the policy of collective security in the case of Manchuria and Abyssinia the world had understood the now famous "quarantine" speech of President Franklin ROOSEVELT of 5 October 1937 and the "Stop Hitler"! warnings of the same President before and after "Munich" as an announcement that the United States would act on the next occasion. The declaration of neutrality of 5 September 1939 could therefore only mean: Like Great Britain and the Soviet Union, the United States accepts as a fact the collapse of the system of collective security.

This declaration of neutrality has often been looked upon as the death blow for the system. The Washington government could reject such a reproach as unjustified. For the system had already been dead for years, in so far as one believes at all that it was ever actually alive. But many did not see the fact that it was not alive at the moment, until the blinding light of the American declaration of neutrality fell upon it.

On the 1 September 1939 a decision had already been reached long before about the various experiments which had been tried since the first World War to replace the "anarchic world order" of classic International Law by a better, a rea, order of peace; i.e. to create in the community of states a general statute according to which there would be wars which are forbidden by law and others which are not forbidden by law. These experiments had, in the opinion of the major powers of the time, collapsed.

The greatest military powers of the earth clashed in a struggle in which they used their full strength. For the proponents of the materialistic conception of history this was a second phase in a process developing according to inexorable laws, in which history ignored diplomatic and juridical formulas with supreme indifference.

For the majority of the international lawyers of the world did state: In the general international law at present valid there is no distinction betwee forbidden and not forbidden wars.

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Hans KELSEN demonstrated this in 1942 in his paper "Law and Peace in International Relations" which he wrote after a careful research into the literature. In this he himself belongs to the minority who concede a legal distinction been justified and unjustified wars. His statement therefore carries all the more weight.

But now we must ask: Are we right in speaking of the collapse of the system of collective security at all? This presupposes that such a system at or time existed.

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Can this really be asserted ? This is a question of the greatest importance for this trial, in which the existence of a world wide consciousness of right and wrong is taken as the basis for the indictment for breach of the peace.

There arises before us the tragedy of the Briand-Kellog Pact, that tragedy from which we all suffered so much, we who rejoiced when the pact was concluded and later, after a first period of depression, greeted the Stimson Doctrine as a long overdue step absolutely essential for the achievement of real peace, and as an encouraging omen of fresh progress.

The United States had a great goal in view in 1927 and 1928, as I have already mentioned. In the League of Nations the problem had been tackled only half-heartedly and with half measures, and this had perhaps done more harm than good to the cause of real peace. The Geneva Protocol had gone on the rocks. Kellog now wanted to get over all the diffidulties which are actually essential parts of the problem, and jerk the world out of its deadlock by taking action without worrying much about theories. The published treaty with its two articles, the renunciation of war and the obligation of peaceful settlement, seemed to fulfil the longings of a humanity which wanted to see at last the act which would liberate it.

But the difficulties which it was desired to get over are partially inherent in the problem, and no regulations made by any legislator can ever eliminate them completely. For even if one disposed of unambiguous criterions, who among us fallible human beings would have the authority to give a decision in case of dispute ?

But we do not even posses unambiguous criterions of aggression and defence. This holds both for the so-called political concept, which is in a way the natural one, and for the legal concept or concepts of aggression and defence.

But these were not the only difficulties pointed out explicitly and implicitly by the French Government in the preliminary negotiations for the pact, and this with the full right of one who knows Europe and its very old historical legacy in the way the United States Government knows America and its quite different history. Even if somebody were capable of jumping over his won shadow, the shadow cast by European history is so much longer.

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When the world got to know the notes exchanged during the preliminary nagotiations, with all the definitions, interpretations, qualifications and reservations, it became manifest to what an extent the opinions of the government's differed from one another despite one and the same wording. One saw the Soviet Governments open -even bitter- criticism of the refusal of the Western Powers to disarm and thus create the essential precondition for an effective policy of peace, further of the vagueness of the treaty but especially of the famous English reservation of a free hand in certain regions of the world, the reservation which has often been called the British Monroe Doctrine or the Chamberlain Doctrine, and one knew that in reality there existed only formal agreement behind the signatures and that no two powers understood exactly the same thing by the treaty. Only on one thing did complete agreement exist : War of self defence is permitted as an unalienable right of all states; without this right, sovereignty does not exist; and every state is alone judge of whether in a given case it is waging a war of self-defence.

No state in this world was ready to accept foreign jurisdiction concernong the question of whether its decisions on ultimate questions of existence were justified or not.

Kellog had declared to all the nine states participating in the negotiations, in his Note of the 25 June 1928 :

".....The right of self-defence .... is inherent in every sovereign state and is implicit in every treaty. - Every nation ... is alone competent to decide whether circumstances require recourse to war in self-defence.

The friends of peace were cruelly disappointed.

What was the use of such a treaty anyway ?

They were only too right.

Very soon afterwards they heard with even greater grief of the course of the discussions in the American Senate. The ratification was, it is true, passed with 85 votes against one, with few abstentions, but, if behind the signatures of the contracting states there was no material agreement, there was even less behind the result of the vote in the Senate of the leading world power ideologically and as far as the initiative was concerned.

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The discussions in the Senate, which remain memorable for all time because of their profound seriousness and loftiness shown -- and several Senators expressly said so- that the opinions of the Senators oscillated between two poles which were worlds apart. For some the treaty really meant a turning-point; to others it appeared worthless, or, at best, a feeble or friendly gesture, a popular slogan, a sort of international kiss, to still others a fertile soil for all the wars of the future, a gigantic piece of hypocrisy even the legalisation of war or of British world control, or the guaranteeing of the unjust status quo of Versailles for France and Great Britain. Some senators criticized the complete vagueness of the stipulations of the treaty even more sharply than the Russian Note. And if one took Kellogg's declaration about the right of self-defence, which, according to the will of the signatory states, was an integral part of the treaty, literally : what kind of war was then forbidden at all ? Sarcastic and ironic words were used.

Nothing was gained by this Paris Pact if everything were to remain as it stood at its conclusion. In the opinion of the great American expert on International Law, Philip Marshall BROWN, the pact unwittingly engendered by its ineptness the horrible monster of "undeclared war".

Those who fought against Versailles, Germans and non-Germans, because progress was blocked, and those who criticized the League of Nations, Germans and non-Germans, because it did more harm than good to the will for progress, had all rejoiced for nothing at the end of August 1928. The decisive step had not been taken.

But above all the one thing that is not sufficient in itself but is indispensable if a guarantee of peace is really to be created, the one thing that in the unanimous opinion of all who reckon with human beings as they really are is necessary, was not tackled at all :

To create a procedure by which the community of states can, even against the will of the possessor, change conditions that have become intolerable, in order to provide life with the safety-valve it must have if it is to avoid an explosion.

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Just as the state can, if at all, avoid revolutions only by good legislation and by adjusting the laws to the altered manner of life in good time, so it is with the community of states as well . Wilson also had this fundamental principle in mind as we saw. One of the great British experts on international law, one of the enthusiastic, unconditional and progressive adherents of the Paris Pact, McNAIR, took this into account too when, in 1936, he wanted to have placed beside collective force the collective and peaceful revision of conditions which had become, dangerous. This was taken into account by the American experts on International Law, BORCHARD amd FENWICK, in their warring explanations of the aspects of the situation connected with international law, shortly before the second World War. The Government of the German Reich had, by the way, pointed out this problem which overshadowed all others, in Stresemann's Note to the American Ambassador dated the 27 April 1928, when unconditionally agreeing to Kellogg's proposal.

The problem of "collective revision" was not seriously tackled later on either. This is not surprising, if only because the very character of such an institution presupposes renunciation of their sovereignty by the states. And can such a reninciation be considered in the times we live in ? Philip BROWN melancholically thinks that this is less possible than ever. And for this reason a real forward stop in the question as to how war could literally be outlawed was not practicable.

The Government of the United States and the League of Nations did a great deal to satisfy the urgent demands of the nations in spite of these inextricable interdependences. They subsequently tried to give the pact a precise content and "teeth". The science of international law provided suggestions for this and checked it. We must also trace this process briefly even though it remained completely unsuccessful, because the seeds of the ideas contained in the Indictment are to be found here, insofar as its line of argument is not a political or ethical, but a legal one.

Firstly: In its ban on aggression, the Paris Pact unquestionably starts from the political concept of aggression. But in that it is quite indefinite.

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SHOTWELL and BRIERLY, among others, tried to help immediately by deducing a legal concept of aggression from the second Article of the Treaty, which Article establishes the obligation to follow a procedure of peaceful settlement. We can leave open the question whether this interpretation may be applied to the treaty. In practice nothing is actually gained by doing so; one kind of difficulty is simply put in the place of another. There are no fewer obscurities: the measures of peaceful settlement presuppose good will on both sides; what, then, if is lacking on the other side ? And what is still a measure of peaceful settlement and what is one no longer ? The Russian Government was quite right in the above-mentioned note of 31 August 1928 to the Briand-Kellogg Pact when it expounded this question.

Then : Other attempts to help tried to develop a completely new world constitution from the entirely indefinite pact by means of logic. They are connected with the name of the American Secretary of State Stimson and with the work of the Budapest Meeting of the International Law Association in 1934.

To understand this it is necessary to assume that the Kellogg Pact really brought about, in a legally definable manner, an unambiguous and unconditional renunciation of war. Then of course, there no longer exists the right to wage wars as and when one likes. War waged against this prohibition is an offence against the constitution of the community of states. We are immediately faced by the question:

Can the legal position of a State which attacks contrary to law be the same as that of a State which is attacked contrary to law ?

If one answers: No, as does for instance the influential French commentator of the League of Nations Covenant, Jean Ray, does this then mean the elimination of the most important fundamental principles of classic International Law ?

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Do the international laws of war - which after all assume the right to wage war freely and the duel-like character of war and, at any rate, the equality before the law of the belligerents - appl for the appreciation of the actions of the belligerent powers agair one another?

Is it possible, or indeed permissible, that neutrality should still exist in such a war?

Can the result of the war, if the aggressor is victorious, be recognized by law, especially if it is put into the form of a treat or must not the community of States deprive the aggressor of the spoils of his victory by a policy of non-recognition? Should there be, or perhaps even must there be, common coercive action by the states against the agressor?

It must be noted: Not even the theory of law has drawn all the conclusions. The practice of the states, after a few tentative beginnings in isolated points, did not finally carry things to a conclusion in a single case.

With regard to the first point:

The validity of the international laws of war during a war, whatever the latter's origin, has not as yet been seriously disputed by any state. Any doubts that arose were cleared up in a way which allowed of no misunderstandings. I draw attention to Resolution No 3 of the League of Nations Assembly of the 4 October 1921 and to the report of the Committee of Eleven of the League of Nations for the adaptation of the Covenant to the Pact of Paris. The aggressor state has the same rights and duties in a war as the attacked nation, i. e. those laid down by the traditional international laws of war. The French Chief Prosecutor appears to wish to deviate from this line, but not to wish to draw the full conclusions But I do not see any tendency to deviate from the present path even in the most recent practice of states.

With regard to the second point:

Attempts have been made to deny the obligations imposed by neutrality, and in fact finally to give the states not involved

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the right of non-neutrality and even the right to wage war against the aggressor. Some statesmen and scholars have devoted themselves just as passionately to undermining and even to denying the right to neutrality as other statesmen and scholars have spoken in favour of its undiminished continuance. The clearer it became that the whole system of collective security did not function in the particular cases which were of decisive importance, namely in those cases where steps would have had to be taken against a great power, the more the idea of neutrality asserted itself with new strength. The complete discrediting of the League of Nations and of the syste. of the Briand-Kellogg Pact in the Abyssinian conflict put classic international law back in its old position again here too. In 1935 Switzerland declared her unrestricted neutrality; Belgium, Denmark, Finland, Luxemburg, Norway, Holland and Sweden followed with their Declaration at Copenhagen on 24 July 1938. The failure of the League of Nations was the reason, this fact also being mentioned openly.

With reference to the third point:

The following is the idea of the policy of nonrecognition. The states not involved in a conflict should conduct themselves as members of the community of states, i. e. they should protect the constitution of the community of states by refusing to recognize the fruits of the victor's victory, should he have been the aggressor. The situation he has created by force should not even seem to become a legal situation. He will thus be deprived of what he has gained, and one of the main inducements to wage war will thereb. be eliminated. Such a policy of non-recognition is undoubtedly not enough to guarantee a system of collective security by itself, but it is an indispensable part of such an order. There can be no dispute about this. The Brazilian representative BRAGA gained merit by proposing, at the 2nd League Assembly in 1921, such a policy to be followed by the members of the League of Nations under the name of a "universal juridical blockade" (blocus juridique universal).

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The Finnish representative PROCOPE interpreted Article 10 of the Covenant in this sense in 1930 before the League Assembly. The Notes of the American Secretary of State STIMSON of 7 January 1932 to CHINA and JAPAN made this idea echo throughout the world. Their contents are commonly called the Stimson Doctrine. The League of Nations accepted the Doctrine as a resolution of the Assembly dated the 11 March 1932. The idea was later the central point of the Pact of Rio de Janeiro of 10 October 1933 and of the Budapest Articles of 10 September 1934.

The conflict between Italy and Abyssinia in 1935/36 became the great test-case, which decided the fate of the system of collective security:

The League of Nations declared a member which was a great power to be the aggressor and decreed economic sanctions, but then shrank from coercive military measures and finally, after Italy's victory, struggled painfully in debates on procedure, especially at the 18th Assembly of the League, to find an answer to the question as to how the League, without openly betraying its constitution, could cross the attacked member, the minor-power Abyssinia, off the list of existing states and recognize it as part of the Italian Empire. The United States also did not enforce the Stimson Doctrine, but remained strictly neutral.

It is necessary to know all this; and also to know that the British Government on 20 February 1935

politely but firmly refused, through the Lord Chancellor, Viscount Sankey, to accept the logical deductions, and paid tribute to the old truth : it is not logic but history that creates law. On a later occasion, when Secretary of State Cordell Hull had explained the principles of American policy to all the powers on the 16 July 1937, the Portuguese government isued a warning against "the abstract and generalizing tendency of jurists"; it warned against attempts to "find a single formula" and against not studying historic facts sufficiently.

We therefore come to the conclusion that :

In the practice of the relations between states there existed - at least during several years prior to 1939 - no effective general ruling of international law regarding prohibited war.

No such general rulling existed so far as the leading statesmen and the peoples were aware.

This is, in fact, the ultimate reason why the path of special rulings on international law was followed to an over increasing extent : two states would then conclude treaties, in full knowledge of their particular historical conditions and with a view to securing peace between themselves.

Now, during the second World War the United States Government decided to help Great Britain. Great Britain was able to acquire destroyers and it later received the assistance of Lend-Lease. The American public recognised this act of assistance as being essentially no longer neutral; it was regretted by some, welcomed by others, now attacked and now defended. The supporters of the measures before the American public, above all Stimson and Cordell Hull, quite rightly did not attempt to justify them as consistent with neutrality. On the contrary, they took up their stand on the Pact of Paris as interpreted by the Budapest Articles. As we saw, this would, according to Viscount Sankey's indisputably correct conception of what are the sources of international law, have been wrong even in 1935.

After the developments which had taken place since Italy's victory over Abyssinia, such discussions were entirely outside the field of legal realities. Their purpose was to resolve internal dissensions in America and they could therefore be of no direct importance for international law. Even had these discussions taken place between states, they could at most have helped to create law. But is it actually necessary to assert or prove that such

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discussions could not have created, during the great struggle, a law to attain which so many efforts - efforts which proved to be Utopian - were made in vain in peace-time ? In this court many ways of legal thinking meet - ways which are in part very different. This leads to certain insoluble differences of opinion. But no way of legal thinking anywhere on earth, from the most ancient times to the most recent, could or can make possible arguments which contradict the very nature of law as a social order of human life arising out of history. If several governments accept articles, about the contents of which they are of different opinions, and if these articles then find no real application in the practice of these governments - which is not to be wondered at considering the circumstances under which they arose - and it theorists then interpret these articles and the practice of Governments rejects these interpretations either expressly or tacitly, one must then resign oneself to this, in so far as one wants to keep to the task of legal appreciation, no matter how much the goal may be worth striving for politically or morally.

But let us forget for a moment the bitter realities of those years following the Italo-Abyssinian conflict. Let us suppose for a moment that a general and unambiguous pact had existed, accepted and applied by the Contracting Parties in fundamental and factual agreement. Would the liability of individuals to punishment for the breach of such a treaty be laid down in international law ?

No.

Not even the liability of the State to punishment, let alone that of individuals.

The breach of such a treaty would not differ under the international law at present valid from any other violation of international law. The state which violates a treaty would commit an offence against international law, but not a punishable act. Attempts were occasionally made to deduce from words "delit" (offence), "crime international" (international crime) and "condamnation de la guerre" (condemnation of war) the existence of an International Criminal Law dealing with our case. Such conclusions are based on wrong premises. Every lawyer knows that any unlawful behaviour can be called a "delit" (delictum), not only punishable behaviour. And the word "crime" is used even entirely outside the legal sphere. And this is precisely the case here. When, in 1927, on Poland's application, the League of Nations Assembly declared war

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to be an international crime, the Polish representative expressly stated that the declaration was not actually a legal instrument, but an act of moral and educational importance.

The attempt to organise a universal world system of collective security on a legal basis failed. But this does not mean that the numerous bilateral treaties, whose purpose it is to preclude wars of aggression between the two partners, became inapplicable. One will actually have to examine whether the parties to the treaty may have made the existence or continued existence of a general machinery of collective security the prerequisite for the validity of the treaty.

The same applies to unilateral assurances of non-aggression as to the bilateral treaties.

Many bilateral non-aggression pacts were conclued, and several unilateral assurances were given. In some cases the political and in some a legal concep of aggression, and even a number of such legal concepts side by side, determine right and wrong. The German Reich also concluded a series of such pacts. They have been drawn upon by the prosecution as an argument. One must examine whether all these treaties were still in force at the critical moment. This examination must be left to the individual defence counsel. But if the German Reich did attack in an individual case in breach of a non-aggression pact which was still valid, it committed an offence in international law and is responsible therefore according to the rules of international law regarding offences in international law.

But only the Reich. Not the individual, even if he were the head of the state.

This is beyond all doubt according to the international law at present valid.

It is unnecessary even to speak about this. For up to the most recent times not even the possibility has been mentioned, either in the Manchurian, or in the Italo-Abyssinian or in the Russo-Finnish conflict, of instituting criminal proceedings against those people who were responsible, on the Japanese Italian or Russian side, for planning, preparing, launching and prosecuting the war, or who simply participated in these acts in any way. And it was certainly not because matters had, paradoxically enough, not been thought out to the end, that they were not prosecuted. But they were not prosecuted because this can

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not happen as long as the sovereignty of states is the organizational basic principle of the whole inter-state order.

THE PRESIDENT : I think this would be a convenient time to break off.

(A recess was taken)

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DR. JAHRREISS: S hould things reach the point where, according to general world law, the men who p rticipated in the planning, preparation, launching and prosecution of a war forbidden by international law could be brought before an international criminal court, the decisions regarding the state's ultimate problems of existence would be subject to super-state control. One could of course still call such states sovereign, but they would no longer be sovereign. In his paper of late 1943 which I have already mentioned several times and which he wrote after the Moscow conference of the 1 November 1943, Kelsen again and again repeats the phrase that in questions of breach of the peace, the liability of individuals to punishment does not exist according to the general international law at present valid and can not exist on account of sovereignty.

For Europeans, at any rate, the state has for the last four centuries, above all since the ever more rapid advances made by the idea of the national state, gained the dignity of a superperson.

Of course acts of state are acts of men. But they are in fact acts of state, i.e. acts of the state carried out by its organs and not the private acts of Mr. Smith or Mr. Robinson.

What the Indictment is doing when, in the name of the world community as a legal entity, it wants to have individuals legally sentenced for their decisions regarding war and peace, is, when one looks at it from the angle of European history, to look upon the state as one would look upon a private individual, indeed, more than that, what it is doing is to destroy the state mentally. Such a charge, the moral justification of which is not my concern--such a charge is, as we have already shown, incompatible with the very nature of sovereignty and with the feeling of the majority of Europeans. It seems, indeed, as though not only Europeans feel that way. In 1919, in Paris, it was the American delegates at the War Guilt Investigation Committee who opposed most strongly any legal sentence on the Kaiser for the very reason of the incompatibility of such a procedure with the sovereignty of the State. And it is impossible to recognize the idea of sovereignty more

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strongly than Kellogg did eight years later during the negotiations in connection with the Pact of Paris, when he declared, as I have already said, ["Every state is the sole judge of its behaviour with regard to questions affecting its existence."]

There are epochs which idolize the sovereignty of the State, others anathematize it. Some idolize and anathematize it simultaneously. Our epoch does so. Perhaps we are living in a period of transition. Perhaps a transformation of values is taking place. Perhaps world community will become the supreme political treasure for the peoples, in place of their own particular States, which have at any rate held this position hitherto. Perhaps we shall reach a point where the unleashing of a war deserving moral and also legal condemnation will, for the general legal conscience, constitute high treason against the world community. Perhaps we shall reach a point where it will be permissible, or even compulsory, to betray a government which starts such a war to foreign countries without a legal justification for calling this high treason towards one's country. At the moment in no nation is there a majority--let alone unanimity -- in support of this opinion.

The punishment of individuals by the legal family of nations for breach of the peace between states can thus be ordered only if the fundamental principles of the international law currently valid and the scale of values which has for centuries been firmly rooted in the feeling of the European nations, are abandoned -- that scale of values according to which the state, one's own sovereign state, forms the indispensable foundation for free personality.

The Indictment mentally wipes out the German state for the time when it stood upright in its full strength and acted through its organs. It must do so if it desires to prosecute individual persons for a breach of the peace between states. It must turn the defendants into private individuals. But it then combines them -- so to speak on the private plane --with the help of the criminal law concept of a conspiracy which is taken from Anglo-Saxon law and

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is strange to us, gives them the many millions strong substructure of organization and groups which are designated as criminal, and thereby again places a superperson before us.

In as far as the Charter supports all this by its regulations, it lays down fundamentally new law, if - with the British chief prosecutor - one measures them against existing international law. That which, originating in Europe, has finally spread to the whole world and is called international law, is, in essence, a law of the coordination of sovereign states. If one measures the regulations of the Charter against this law, one must say: The regulations of the Charter negate the basis of this law, they anticipate the law of a world state.

They are revolutionary. Perhaps in the hopes and longings of the nations the future is theirs.

The lawyer, and only as such may I speak here, has only to establish that they are now - revolutionarily now. The laws regarding war and peace between states had no place for them - could not have any place for them. Thus they are criminal laws with retroactive force.

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Now the French chief prosecutor - if I understand right - recognized the sovereignity of states in his humanly very moving speech and quite rightly saw that an unbridgeable gulf exists between the Charter and the international law at present valid, when it wants to see individuals punished as criminals for breach of international peace. He therefore shifts the trial from the plane of international law to that of constitutional law. It might possibly have happened that a German state power would have settled accounts after the war with those people who were responsible for launching the war. As the whole life of the German people is crippled today, those foreign powers who, in cooperation with each other on the basis of treaties, have territorial power in Germany, are undertaking this settlement of accounts.

The Charter has laid down the rules which are to guide the Court in its investigation and verdict.

One can here leave unexamined whether this opinion is legally right or not. Even if it is right, our question is not altered therby:

When looking at the problem from this point of view, no less than from that of international law, we must know how far the Charter creates penal law with retroactive force. But we must now measure the regulations of the Charter not only against the international law which was valid for Germany and was transformed into national law - as people are wont to say - but also against the national criminal law which was binding on the defendants at the time of the deed. It is, after all, possible for a state, a member of the community of states, to be more cosmpolitan in its criminal law than the current international law. The rule of the Charter which is new with regard to existing international law may correspond to an already existing national law, and then it would not be a criminal law with retroactive force. So how was the breach of peace between states - particularly the breach of non-aggression pacts - treated in the national criminal law to which the defendants were subject at the time of the preparation and launching of the war?

It is possible that, in a state, those people are threatened with punishment who have prepared or launched or waged a war in breach of the international obligations of that state. (78) That would actually be completely unpractical. For the result of a war also decides the internal settling of accounts. No

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criminal court threatens a victorious government. But, in case of defeat, the defeat itself gives the measures of the settlement of account. In any case the regulations of the Charter regarding punishment for breach of the peace between states are new for the national criminal law which the defendants were subject to at the time of the deed. But if one does not understand the phrase "null um crimen, nulla poena sine lege" as it is understood on the European continent, i.e. as meaning that law in the sens of "lex" is a rule laid down by the state, a state law, but is of the opinion which - as far as I can see - is peculiar to English legal thinkers, that law in the sense of "lex" can also be a deeply rooted rule of ethics, or morality, we have one question left: As things happened to be, did the defendants, - formerly ministers, military leaders, directors of economy, heads of higher authorities, feel at the time of the deed, or could they have felt - that a behaviour which is now made punishable by a retroactive law was against their duty?
The answer to this question cannot be given unless one has an insight into the nature of the constitution of the German Reich at the moment of the deed.

The German Reich was incorporated into the community of states in that form, with that constitution, which it happened to have at any given moment. Such is the case with every member of the community of states. The United States and the British Empire, the Union of Soviet Socialist Republics and the French Republic, Brazil and Switzerland stand inthe framework of the family of nations with that constitution which they happen to have at the time.

The prosecution has, with full justification, tried to give a picture of this concrete legal structure of the Reich. For, without trying to do this, no one in this trial will be able to arrive at a decision regarding right and wrong. In addition it seems to me that many ethical question s which have been raised here require such an attempt to be made. But I am afraid that, with the picture presented by the prosecution, it is not possible to arrive as close to the truth as is possible in spite of the complex nature of the subject.

The prosecution starts with the conception of a conspiracy to conquer the world on the part of a few dozen criminals. The German State, if one looks upon things in this way, becomes a mere shadow or tool. But this State

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had long been in existence; no one could set aside the enormous weight of its history. It was only various things in this history, at home and especially abroad, that made Hitler's rise to power at all possible or which made it easier for him, and it was many things in this history that guided, urged on, limited or put a brake on Hitler in his choice of aims and means, and helped to decide the success or failure of his measures and undertakings.

The prosecution was certainly right in lawying great stress on the so-called Fuehrer principle. This so-called Fuehrer principle was, in fact, for the eyes and even more for the ears of the German people and of the world in general, the organizational guiding principle in the development of the Reich constitution after 1933.

It was certainly never unambiguous and it considerably changed its character during the course of the years. In the life of men, leading and commanding present inherent contradictions.

There exists one - may I say - soulless, mechanical way of governing mankind, which is to rule by issuing commands, and there is another one, which is to lead the way by setting an example and to be followed voluntarily, which is to lead or whatever one wishes to call it. This differentiation between two fundamentally different methods of governing men is often already made difficult by the words used; in the German languages for instance, this is so because leading is sometimes called unconscious ruling, and ruling is sometimes called leading. Furthermore, the differentiation is rendered more difficult by the fact that it is at one time leading and at another commanding that governs the relations between the same persons or by the fact that methods which are actually applicable to leading are used for ruling, andevice versa. Every State has been is, and will be faced by the question of how

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it is to link up both these methods, so that they complement, advance and keep a check on each other. Both methods appear continually and everywhere. There has never yet been a really great ruler who was not also a leader. But minor rulers are also subject to this law. And the Hitler regime brought about - at least to begin with - a synthesis of both methods which had at least the appearance of being tremendously efficient.

To this synthesis has been attributed - perhaps not unjustly - much of what the world saw with wonder, sometimes approvingly but more often disapprovingly, as the result of an unheard of mobilization, concentration and increase in the energies of a nation.

This particular synthesis of leading and commanding found its strongest expression in the person of Hitler himself, in his actions of leading, for instance in his speeches and in his commands. Hitler's acts of leading and commanding became the motive power of the German political life of that time. Justice must be done above all to this phenomenon. It is of absolutely decisive importance for judging the enormous mass of facts which has been produced here. With all the caution which is natural to men who think along scientific lines and which imposes on them an almost unconquerable mistrust of any attempt to comprehend and evaluate events which havehappened so recently, one can perhaps risk this assertion: In the course of the years, Hitler gave commanding an increasingly favoured place to the detriment of acts of leading, and finally brought it so much to the fore that commands and not the act of leading became the all decisive factor. Hitler the man of the people became more and more the dictator. The speeches in which he repeated himself ad nauseam even for his most willing followers and overshouted to the irritation even ofmembers of his entourage who had faith in him, became rarer, but the legislative machine worked faster and faster. A later age will perhaps realize how far the great change in the attitude of the German people to Hitler, which was beginning even before the war, was the cause or effect of this change.

While, on the question of something superficial, i.e., the question as to how he wished to be designated, Hitler pressed not to be called "Fuehrer and Reich Chancellor" any longer but only "Fuehrer", the way in which the

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state was being governed was following the exactly opposite path; leading disappeared more and more and there remained naked domination. The Fuehrer's orders became the central element of the German state edifice.

In the public hierarchy, this development brought with it rather an increase than a decrease in Hitler's power. The great majority of German officials and officers had seen nothing behind the organized leadership but a machinery of domination with a new label and, if possible, of an even more bureaucratic nature, side by side with the inherited state machinery. When Hitler's orders became the Alpha and Omega, they felt themselves, so to speak, back in the old familiar path. The queer and puzzling part was gone. They were back in their world of subordination. But anyway this development had given the Fuehrer's orders a special aura of sanctity for them too; there was no contradicting the Fuehrer's orders. One could perhaps raise objections but if the Fuehrer stuck to his order, the matter was decided. His orders were something quite different from the orders of any official of the hierarchy under him.

Here we have come to the fundamental question in this trial: What position did Hitler's orders occupy in the German constitution? Did they belong to the type of orders which were set aside by theCharter of this Court as grounds for the exclusion of punishment?

It was perhaps harder for a lawyer who grew up in the habits of the so-called constitutional state ("Rechtsstaat") than for other people to witness the slow and then ever more rapid disintegration of the guarantees of the constitutional state; for he never came to feel at home in the new order and always stood half outside it. But, for this very reason, he probably knows more than anyone else about the peculiarities of this new order. An attempt must be made to make it comprehensible. State orders, whether they lay downrules or decide individual cases, can always be measured against the existing written and unwritten law, but also against the rules

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of international law, morals and religion. Someone, even if only the conscience of the person giving the orders ordered something which he had no right to order? Or: has he formed and published his order by an inadmissible procedure? But an unavoidable problem for all domination lies in this: Should or can it grant the members of its hierarchy, its officials and officers, the right - or even impose on them the duty - to examine at any time any order which demands obedience from them, to determine whether it is lawful, and to decide accordingly whether to obey or refuse?

No domination which has appeared in history to date has given an affirmative answer to this question. Only certain members of the hierarchy were ever granted this right; and they were not granted it without limits. This was also the case, for instance, under the extremely democratic constitution of the German Reich during the Weimar Republic and is so today under the occupation rule of the four great powers over Germany.

In as far as such a right of examination is not granted to members of the hierarchy, the order has legal force for them.

All constitutional law, that of modern states as well, knows acts of state which must be respected by the authorities even when they are defective. Certain acts of laying down rules, certain decisions on individual cases which have received legal force, are valid even when the person giving the order has exceeded his competence or has made a mistake in form.

If only because the process of going back to a still higher order must finally come to an end, orders must exist under every government that are binding on the members of the hierarchy under all circumstances and are therefore law where the officials are concerned, even if outsiders may see that they are defective as regards content or form, if measured against the previous laws of the state concerned or against rules imposed from outside the state.

For instance, in direct democracies, an order given as the result of a plebiscite of the nation is a fully valid rule or an absolutely binding decree. Rousseau knew how much the " volonte de tous" can be in contradiction to what is right, but he did not

fail to appreciate that the orders of this "volonte de tous" are binding.

In indirect democracies the resolutions of a congress, of a national assembly or of a parliament may have the same force.

In the partly direct, partly indirect democracy of the Weimar Constitution of the German Reich, the laws resolved by a majority of the Reichstag large enough to alter the constitution and proclaimed by the president were under all circumstances law for all functionaries, including the independent courts of law, even if the legislator - knowingly or unknowingly - might have violated rules not imposed by the state but by churches or by the community of states. In the latter case the Reich would have been guilty of an international offence. For it would not have seen to it that its legislation was in accordance with international law. It would, therefore, have been responsible in accordance with the international regulations regarding reparation for international offences. But until the law concerned had been eliminated in accordance with the rules of German constitutional law, all officials of the hierarchy would have had to obey it.

No functionary would have had the right, let alone the duty, to examine its legal binding force with the aim of obeying or refusing to obey it, depending on the result of this examination. This is not different in any other state in the world. It never was and never can be different. Every state has had the experience of its ultimate orders, its highest orders, which must be binding on the hierarchy if the authority of the state is to exist at all, being on occasion in conflict with rules not imposed by the state-to divine law, to natural law and to the laws of reason. Good governments take trouble to avoid such conflicts. To the great sorrow - indeed to the despair - of many Germans, Hitler frequently brought about such conflicts - and serious conflicts. And, if only for this reason, his way of governing was not a good one, even though it was for some years successful in some spheres. Only it must here be asserted straight away: These conflicts

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never affected the entire nation or the entire hierarchy - at least not immediately - but always merely groups of the nation or individual offices of the hierarchy; and it was only some of the people concerned who were fundamentally affected, many being only superficially involved; not to mention those conflicts

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that remained unknown to the overwhelming majority of the people and of the hierarchy, nor, therefore, those orders by which Hitler not only showed himself to be inhuman in individual cases, but simply outside the pale of what is human. It is a purely academic question; Would Hitler's power have taken such deep root, or would it have maintained itself if these inhumanities had become known to larger sections of the people and of the hierarchy? They just did not?

Now in a state in which the entire power to make final decisions is concentrated in the hands of a single individual, the orders of this one man are absolutely binding on the members of the hierarchy. This individual is their sovereign, their legibus solutus, as was first formulated-as far as I can see-by French political science with as much logic as eloquence. After all, the world is not faced by such a phenomenon for the first time. In former times it may even have seemed to be normal. In the modern world, a world of constitutions based on the separation of powers under the supervision of the people, absolute monocracy does not seem to be right in principle. And even if this is not yet the case today, one day the world will know that the vast majority of thinking Germans did not think any differently on this matter from the majority of thinking people of other nations of Europe and outside it.

Such absolutely monocratic constitutions can nevertheless come about as the result of events which no individual can grasp in their entirety and even less control at will .
This is what happened in Germany from the beginning of 1933 onwards. This is what happened gradually, stage by stage to the parliamentary Weimar Republic, which under Hindenburg was changed into a presidential republic, in a process which partly furthered the development by acts of state which stressed legal forms and which can be read in state documents, but partly simply formed the rules by accepted custom. The Reich law of the 24 March 1933, by which the institution of Reich government laws was created and thus the

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separation of powers in the sense in which it had been customary was, in practice, eliminated, was, according to the transcript of the Reichstag session, brought about with a majority sufficient for altering the constitution. Doubts about the legality of the law have nevertheless been raised on the grounds that a section of the elected deputies had been kept away from the session by the police and another section of the deputies who were present had been intimidated so that only an apparent majority sufficient for altering the constitution had passed the law. It has even been said that no Reichstag, not even if everybody had been present and all of them had voted, could have abolished the fundamental constitutional principle of the separation of powers, as no constitution could legalise its own suicide. We need not go into this: the institution of government laws became so firmly rooted as a result of undisputed practice that only a formal jurisprudence that is entirely cut off against the realities of life and to ignore the constitutional change which had taken place. And for the same reason one's arguments are misguided if one ignores how the institution of government laws, i. e. of cabinet laws, was later changed by custom into one of several forms in which the Fuehrer legislated. At the base of every state order, as of any order whatsoever, there lie habit and custom. From the time when Hitler became head of the state, practice quickly led to Hitler standing both before the hierarchy and before the whole people as the undisputed and undisputable possessor of all competence. The result of the development was at any rate that

> Hitler became the supreme legislator as well as the supreme author of individual orders.

It was not least of all under the impression of the surprising successes, or what were considered successes in Germany and abroad, above all during the course of this war, that he became this. Perhaps the German people is - even though with great differences between North and South, West and East - particularly easily subjected to actual power, particularly easily led by orders, parti-

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cularly used to the idea of a superior. Thus the whole process may have been made easier. Finally the only thing that was not quite clear was Hitler's relationship to the judiciary. For, even in Hitler-Germany, it was not possible to kill the idea that it was essential to allow justice to be exercised by independent courts, at least in matters which concern the wide masses in their everyday life. Up to the highest group of party officials - this has been shown by some of the speeches by the then Reich Justice Leader. The defendant, Dr. Frank, presented here - there was resistance, which was actually not very successful, when justice in civil and ordinary criminal cases was also to be forced into the "sic volo sic jubeo" of the one man. But: apart from the judiciary, which was actually also tottering, absolute monocracy was complete. The Reichstag's pompous declaration about Hitler's legal position, dated the 26 April 1942 was actually only the statement of what had become practice long before.

The Fuehrer's orders were law already a considerable time before this second World War.

In this state order of his, the German Reich was treated as a partner by the other states, and this in the whole field of politics. In this connection I do not wish to stress the way (so impressive to the German people and so fatal to all opposition) in which this took place in 1936 at the Olympic Games, a show which Hitler could not order the delegations of foreign nations to attend, as he ordered Germans to the Nurnberg party rally in the case of his state shows. I should like rather only to point out that the governments of the greatest nations in the world considered the word of this "almight" man the final decision, incontestably valid for every German and based their decisions on major questions on the fact that Hitler's order was incontestably valid. To mention only the most striking cases, this fact was relied upon when the British Prime Minister, Neville Chamberlain, after the Munich conference, displayed the famous peace paper when he landed at Croyden. This fact was adhered to when people went to war against

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the Reich as the barbarous despotism this one man.

No political system has yet pleased all people who live under it or who feel its effects abroad. The German political system in the Hitler era displeased a particularly large and ever increasing number of people at home and abroad. But that does not in any way alter the fact that it existed, not lastly because of the recognition from abroad and because of its effectiveness, which caused a British Prime Minister to make the now world-famous statement at a critical period, that democracies need two years longer than the totalitarian governments to attain a certain goal. Only one who has lived as if expelled from amongst his own people, amidst blindly believing masses who idolized this man as infallible, knows how firmly Hitler's power was anchored in the anonymous and innumerable following who believed him capable only of doing what was good and right. They did not know him personally, he was for them what propangada made of him, but this he was so uncompromisingly that everybody who saw him from close to and saw otherwise, knew clearly that resistance was absolutely useless and, in the eyes of other people, was not even martyrdom.

Would it therefore not be a self-contradictory proceeding if both the following assertions were to be realized at the same time in the rules of this trial?:

1.) The Reich was the despotism of this one man, and for this very reason a danger to the world.

2.) Every functionary had the right - in fact the duty - to examine the orders of this man and to obey or not obey them according to the result of this examination.

The functionaries had neither the right nor the duty to examine the orders of the monocrat to determine their legality. For them these orders could not be illegal at all, with one exception which will be discussed later - an exception which, if carefully examined, is seen to be only an apparent one - namely with the exception of those cases in which the monocrat placed himself - ac-

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cording to the indisputable values of our times - outside every human order, and in which a real question of right or wrong was not put at all and thus a real examination was not demanded.

> Hitler's will was the ultimate authority for their considerations on what to do and what not to do. The Fuehrer's order cut off every discussion. Therefore: A person who, as a functionary of the hierarchy refers to an order of the Fuehrer's, is not trying to provide a ground for being exempted from punishment for an illegal action, but he denies the assertion that his conduct is illegal; for the order which he complied with was legally unassailable.

Only a person who has understood this can have a conception of the difficult inner struggles which so many German officials had to fight out in these years in face of many a decree or resolution of Hitler's. For them such cases were not a question of a conflict between right and wrong: disputes about legality sank into insignificance. For them the problem was one of legitimacy: as time went on, human and divine law opposed each other ever more strongly and more frequently.

Therefore: Whatever the Charter understands by the orders which it sets aside as a ground for exemption from punishment, can the Fuehrer's order be meant by this? Can it come within the meaning of this rule? Must one not accept this order for what it was according to the interior German constitution as it had developed, a constitution which had been explicitly or implicitly recognized by the community of states? Many Germans

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did not like Hitler's position of power from the very beginning, and to many Germans who welcomed it at first because they yearned for clear and quick decisions, it later became a horror. But that does not in any way alter the following fact: must not those people who did their duty in this hierarchy, willingly or unwillingly, in accordance with this consittution, feel that an injustice was being done to them if they were sentenced because of a deed or an omission which was ordered by the Fuehrer ?

A community of states could refuse to accept or tolerate as members as such states as have a despotic constitution. But up, to now this has not been the case. If it is to be different in the future, the non-despotic powers must take the necessary steps to prevent any member of the family of states truning into a despotic power and to prevent any despotic power entering the family circle from outside. Today people are realising more and more clearly that this is the crux of our question. The circumstances must be very special if a modern people lets itself be governed despotically, even if it is as well disciplined as the German people. But as soon as such circumstances do exist, there are no internal counter-measures left. Then only the outside world can help. But if, instead of this, the outside world recognizes this constitution, it is impossible to see where successful internal resistance can come from. In pointing to these special circumstances and to the recognition by the outside world, we draw attention to facts, for the existence of which no German was, in our case, responsible but which cannot be ignored when one asks how all this was possible.

But certain further facts must also be drawn attention to, without a knowledge of which one cannot fully grasp the fact that Hitler's absolute monocracy was able to get such a terribly firm hold. Hitler combined in his person all the powers of issuing legislative and administrative orders on the highest level, orders which could not be questioned and were absolutely valid but immediately below him the power of the state was divided up into a vast mass of spheres of competence. But the dividing lines between these spheres were not always sharply drawn. In the modern state, particularly in the major states of a technical era, this cannot be avoided.

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But the tendency to exagerate questions of competence is certainly no less marked in Germany than in any other country. This facilitated the erection of dividing lines between the departments. Every department watched jealously to see that no other one trespassed into its field. It everywhere suspected tendencies of other departments to expand ; considering the great mass of tasks which the so-called "totalitarian" state had heaped upon itself, cases where two or three departments were competent for the same matter could not be avoided. Conflicts between departments were inevitable. If a conspiracy existed, as the Indictment assumes, the conspirators were remarkably incompetent organizers. Instead of co-operating and going through thick and thin together, they fought each other. Instead of a conspiracy we rather have a dispiracy.

The history of the jealousy and mistrust between the powerful persons under Hitler has still to be written . And let us now remember that in the relations between all departments, and within each department, people surrounded themselves with ever increasing secrecy: between departments and, within the departments, between ranks and within the various ranks, more and more matters were classed as "secret". Never before has there been so much "public life", i.e. non-private life, in Germany as under Hitler; but also never before was public life so screened from the people, above all from the individual members of the hierarchy themselves, as under Hitler.

The one supreme will became, quite simply, technically indispensable.

It became the mechanical connecting link for the whole. A functionary who met with objections or even resistance to one of his orders from other functionaries only needed to refer to an order of the Fuehrer's to get his way. For this reason many, very many, among those Germans who felt Hitler's regime to be intolerable, who indeed hated him like the devil, looked ahead only with the greatest anxiety to the time when this man would disappear from the scene : for what would happen when this connecting link disappeared It was a vicious circle.

I repeat : an order of the Fuehrer's was binding - and indeed legally binding- on the person to whom it was given, even if the directive was contrary to international law or to other traditional values.

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But was there really no dividing line ? During the first period at any rate i.e. just at the time when the foundations of power were being laid, at the time when the monocratic constitution was being developed step by step - Hitler's followers amongst the people saw in their Fuehrer a man close to the people, a selfless, almost superhumanly intuitive and clear thinking pilot, believed only the best of him and only had one worry : whether he was also choosing the right men as his assistants and whether he was always aware of what they were doing. The tremendous power, the unlimited authori were given to this Hitler. As in every state it also included harsh orders. But it was never intended as authority to be inhuman. Here lies the dividing line. But this line has at no time and nowhere been quite clearly drawn Today the German epople are completely disrupted in their opinions, feelings and intentions; but they are probably in agreement on one thing, with very few exceptions : they would not wish to draw this line with less severity as accusers than other peoples do towards their leaders. Beyond that line, Hitler's order constituted no legal justification.

But it must not be forgotten that this line is not only vague by natur but follows a different course in peace to what it does in war time, when so many values are changed, and when men of all nations, especially in our days, take pride in deeds which would horrify them at any other time. And the decision to wage war does not in itself overstep that line, in spite of its tremendous consequences. Not in any nation in the world. Hitler himself, at any rate, did not recognise this dividing line of inhumanity of non-humanity, as a limit of obedience in his relations with his subordinates, and here also opposition would have been considered a crime punishable by death in the eyes and for the decisions of this man with limitless power who controlled an irresistible machine. What should a man who received an order overstepping this line, have done ? A terrible situation ! The reply of Greek tragedy, the reply of Antigone in such a conflict cannot be imposed. It would be Utopian to expect it, or even demar it, as a mass phenomenon.

Before we come to the special question of who in the Reich possessed the power of deciding about war and peace, a further word remains to be said about the forms which Hitler's orders assumed.

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Hitler's orders are solely the decisions of this one man, whether they were given orally or in writting, and in the latter case, whether they were clothed in more or less ceremony.

There are some orders by Hitler which can be recognized as such immediately. They are called "Erlass" (Decree) like the Decree concerning the setting up of the Protectorate of Bohemia and Moravia of 16 March 1939, or "Verordnung" (order), like the order for the execution of the Four-Year Plan of 19 October 1936, or "Weisung" (Directive), like the strategic decisions, so often cited during this trial or simply "Beschluss" (Decision) or "Anordnung" (Instructions) often they are signed in Hitler's name only; sometimes we find the signatures of one or more of the high or highest civil or military functionaries as well. But it would be fundamentally wrong to assume that this was a case of counter-signatures as they are understood in the modern democratic constitutional law of nations ruled constitutionally or by a parliament - of a counter-signature which makes the sighatory responsible to a parliament or to a State Court of Law. Hitler's orders were his own orders and only his own orders. He was much too fanatical a champion of the one-doctrine, i.e. of the principle that every decision must be made by one -and only one- man, to consider anything else even possible, above all things in the case of his own decisions. We will leave his high opinion of himself entirely aside in this connection. Whatever the more or less decorative significance of such counter-signing may have been, there was never any doubt that the Fuehrer's orders represented only his own decision and no one else's.

Special attention must here be drawn to those laws which appeared as Reich Cabinet laws or Reichstag laws.

Hitler's signing of a law of the Reich Cabinet represented the formal certification of a Cabinet decision. In actual fact, however, a stage was reached where the Reich Cabinet laws were also solely decisions by Hitler who had previously given some of his ministers the opportunity to state the opinion of their departmnnts. And when Hitler signed a law which, according to its preamble, had been decreed by the Reichstag, this was again only a case of a formal certification. In reality, however, it was a decision by Hitler.

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From November 1933 onwards at the latest, the German Reichstag was not a parliament but an assembly for the acclamation of Hitler's declarations or decisions. These scenes of legislation appeared to many people at home and abroad almost to be an attempt to make democratic forms of legislation ridiculous by caricaturing them; nobody -either at home or abroad- regarded them as proceedings during which an assembly of several hundred men arrived at a decision after consideration, speeches and counter-speeches.

There are, however, also orders by Hitler which are not signed by him, but which can immediately be recognised as his orders. They are drawn up by a Reich Minister or some other high functionary, who states in the introduction "The Fuehrer has ordered" the "Fuehrer has decreed". We have before us not an order by the signatory, but a report by the signatory on an order given orally by Hitler. The order by Hitler as Supreme Commander-in-Chief of the Armed Forces were thus often clothed in the form of such a report.

Finally there are orders by Hitler which can only be recognised as such by a member of the public if he possesses knowledge of the constitutional position. When the Supreme Command of the Armed Forces (The OKW) issues an order, it is always an order by Hitler, Hitler himself, together with his working staff, was the OKW. The power to issue OKW orders rested solely with Hitler.

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By my explanations regarding the constitution of the Hitler-Reich, I have already -so to speak by implication- dealt with the question as to who was responsible for the ultimate decisions- for this state's decisions regarding questions of existence, especially for the decision about war and peace.....

KELSEN said - in his great treaties of the year 1943, which I have already mentioned above, "probably the Fuehrer alone". We must say :Quite definitely alone.

Under the Weimar Constitution, the sole body responsible was the Reich legislature. For Article 45 demands a Reich law for a declaration of war and for the conclusion of peace. And a Reich law could be passed only by the Reich stag or by a vote of the German people. Neither the Reich President, i.e. the Head of the State, nor the Reich Cabinet had to power. They might, at most, have created such circumstances by acts lying within their jurisdiction -possibly the Reich President as Commander-in-Chief of the Armed Forces- as to give the Reich legislature no option in its decision; a problem which, as far as I know is well-known, has become a real one in the United States with regard to the relationship of the President to Congress and has, therefore, been seriously discussed, while it was not a real one for the Germany of the Weimar Constitution. If, however, the Reich legislature had, by means of a law, taken the decision to wage war, the Reich President and the whole State hierarchy particularly the Armed Forces, would have been bound by this decision with no right of examination, let alone of objection, even if all the experts on international law in the world had regarded the law as contrary to international law. The Wiemar Democracy could have tolerated as little as any other nation a state of affairs in which military leaders as such could examine the decision to wage war taken by the political leaders, in the sense that they could refuse obedience if they thought fit. The military means of power must be at the disposal of the political leaders of a state. Otherwise they are not means of power at all. This has always been so. And it will have to be so all the more if the duty to give assistance against aggression is really to apply amongst the nations.

I have already shown how, in the course of a step by step transformation which laid particular emphasis on legal forms, Hitler replaced all the highest authorities of the Weimar period, and combined all the highest competences in his own person. His orders were law.

The circumstances in a state may be such that the man who is legally solely competent for the decision about war and peace, has, in practice, no - or not the soul-authority. If however, both the sole legal competence and the sole authority in actual practice have ever been coincidental in any state such was the case in Hitelr Germany. And if, in any question, Hitler ever even accepted the advice of a third party, such was not the case in the question of war or peace. He was the arbiter of war and peace between the Reich and other nations.

He alone.

In conclusion:

Sentences against individuals for breach of the peace between States would be something completely new legally something revolutionarily new. It makes no difference whether we view the matter from the point of view of the British or the French Chief Prosecutors.

Sentences against individuals for breach of the peace between states presuppose other laws than those in force when the actions laid before this Tribunal took place.

The LEGAL Q U E S T I O N O F G U I L T, - and I am here only concerned with that - I S T H U S P O S E D I N I T S F U L L C O M P L E X I T Y. For not one of the defendants could have held even one of the two views of the legal world constitution on which the Chief Prosecutors base their arguments.

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THE PRESIDENT: Dr. Sauter, could we take up the time between now and 1:00 o'clock in dealing with that letter if you have it now, and possibly Dr. Exner also has his letter.

DR. SAUTER (Counsel for defendant Funk): The defendant, Walter Funk was questioned here as a witness under oath. After his examination, he told me that on one point his testimony was not quite correct, and he asked me to correct his testimony on this point, since he himself had no opportunity to do so.

On 17 June--I repeat, 17 June 1946--I wrote the following letter to the President of the International Military Tribunal, which is signed by Defense Counsel Dr. Sauter as well as by thee defendant Walter Funk personally. I shall read the text of the letter:

"Re.: P enal case against Walter Funk; correction of the testimony:

"The defendant Walter Funk in his cross examination on 7 May said that he--that is, Funk--heard only through Vice President Puhl of a deposit of the SS at the Reichsbank. The witness, Emil Puhl, when he was examined, testified that it was Funk who had spoken with the Reichsfuehrer SS Himmler and he--that is, Puhl--was then informed by Funk about the deposit to be set up. From the statements of the witness Emil Puhl the defendant Funk reached the conclusion that, in fact, on this point, the statement of the witness Emil Puhl is correct, and, after some consideration, the defendant Funk believed that he could remember himself that it was he, Funk, to whom Reichsfuehrer SS Himmler first applied concerning the establishment of a deposit for the SS and that he then informed Vice President Puhl about this matter.

"The statement by the defendant Funk under cross-examination was due to faulty recollection, because of the fact that these cross-examination questions of the Prosecution had completely surprised and greatly disturbed Funk. Immediately after the examination of the witness Puhl, Funk informed me of his mistake and asked me to correct his factually incorrect statement on this point, since

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he himself would have no opportunity to do so.

"I bring this request of the defendant Funk, and I take the liberty of informing the President of the correct state of affairs. The defendant Funk agrees with this correction by co-signing this letter."

Then there are the two signatures, Walter Funk and Dr. Sauter. That is the contents of the letter which I sent on 17 June 1946 to the President to correct the testimony of Funk.

THE PRESIDENT: Thank you, Dr. Sauter.

Dr. Exner,,have you got your letter that you can read?

DR. EXNER (Counsel for defendant Jodl): Mr. President, I was downstairs in the General Secretary's office, and I was promised it at 1:30, but I have not yet received it. I am sorry; at the moment I am not in a position to fulfill your request.

THE PRESIDENT: You probably will have it at 2:00 o'clock.

(A recess was taken until 1400 hours.)

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(The Tribunal reconvened at 1400 Hours)

DR. EXNER: Mr. President, I shall read the letter dated 22 June 1946, sent to the International Military Tribunal:

"Mr. President:

During the cross-examination on the 6th day of June, 1946, the British Prosecution presented the Defendant Jodl Document C 139, obviously thinking that the document showed evidence of preparatory measures for occupying the Rhineland as early as May 2, 1935."

THE PRESIDENT: I am told that the English is coming through on the Russian line.

(The proceedings suspended temporarily)

THE PRESIDENT: Go on, Dr. Exner.

DR. EXNER: "The defendant Jodl has stated that he had not known the document. After looking through the document, he explained that it is quite obvious from the document that in the West, at any rate, there was no plan for any German action, but that only defensive measures were being expressly talked about. Where it was supposed to be arranged or where it was supposed to take place, he could only guess.

"Defendant Freiherr von Neurath has now informed him that in 1934, during the summer, Mussolini had stationed several divisions at the Brenner Pass in order to occupy northern Tyrol.

"The defendant Jodl after receiving this information perused the document again, and he now guesses that with this document an operation was meant to be prepared, and that the Italians, in the event of their marching in, should be thrown back across the Brenner. But he knows nothing about this affair.

"The entire matter does not affect the defendant Jodl at all, and for that reason I shall not refer to it during this session. He attaches the greatest importance, however, to the fact that the impression is not created that he intended to conceal anything."

It is signed "Exner" , and now Jodl has signed, also.

THE PRESIDENT: Very well.

Now I call on Dr. Stahmer.

DR. STAHMER: Mr. President, first of all, I should like to

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remark that I have still to complete the case Katyn. The case Katyn has not been incorporated into the book which has been submitted to the Tribunal, because only Monday and the day before yesterday did we collect the evidence.

I shall have to state it, therefore, without its being in the book. It is only a brief presentation, and the interpreters will have copies of my document. However, I cannot submit a translation to the Tribunal at this moment, since it was only the day before yesterday that we concluded the hearing of the evidence, and I have not been able to do that.

I shall add this at a suitable moment, and I hope that --

THE PRESIDENT: Some second voice is coming through on the English line.

(The proceedings suspended temporarily.)

THE PRESIDENT: Go on, Dr. Stahmer.

DR. STAHMER: During the time which I had stated, the case Katyn had not been included. Nevertheless, I hoped that I should be able to finish in the time which I have announced; in fact, I may be even a little quicker.

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May it please the Tribunal: this Trial, which is of a historical and political importance, and a significance in shaping new laws and which is of dimensions such as have not been known hitherto in the history of law, these proceedings which concern not only the defendants present in the court, but which are of the greatest importance to the German people, are now passing into a new phase.

As is stated in article 24 h of the Charter, the defense has the floor.

The position of the defense in these proceedings is especially difficult; for there is an all too unequal distribution of strength between the prosecution and the defense.

THE PRESIDENT: We will take a recess.

(A recess was taken.)

Months before the start of the trial the prosecution, with the aid of a huge staff of experienced co-workers, was able to explore all the offices and archives in and outside Germany and to examine witnesses in all territories. So, it was in a position to submit to the Tribunal a tremendous amount of documentary material.

The difficult position of the defense is further aggravated by the fact that, in the Anglo-American procedure on which this trial is based there is a clause missing which is contained in the German criminal procedure according to which the prosecution is also bound to procure and submit evidence, exonerating the accused.

THE PRESIDENT: Dr. Stahmer, let me tell you that the statement you have just made is entirely inaccurate. There is no such thing as an English code of criminal procedure but it is the universal practice for the Prosecution to disclose to the defense any document and any witness who assists the defense and therefore your statement is entirely false and I believe the same practice obtains in the United States.

And as for what you say here about the Defense being under any unfair difficulties as compared with the Prosecution, that also is entirely inaccurate because I feel certain that the Prosecution in this case have observed the same rules that would have been observed in England and would have disclosed to the Defense any document or any witness over whom they had

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control who would assist the Defense and there have been various occasions on which the Prosecution had disclosed in this case to the Defense documents which have been supplied to them which appeared to them to help the Defense.

Every document which has been put in by the Defense in this case or practically every document has been procured for them after great effort, by the Prosecution and investigations have been made all over Germany and I may say almost all over the world in order to help the Defense in their defense in this case.

DR. STAHMER: Thank you for your instructions, Mr. President.

After reading of the indictment, Reich Marshal Goering in reply to the question of the presiding judge as to whether he pleaded guilty or not guilty, declared: "Not guilty in the sense of the indictment."

This statement of the accused necessitates an examination of all the charges made by the Prosecution.

The accused has of course already dealt with many questions, which are of considerable importance for his defense, during his personal examination. He expressed his opinion in detail with regard to political and military happenings and exhaustively described the motives for his actions, and the origin and course of events.

I am thankful to the high Tribunal for permitting the accused to portray matters in all their breadth, as he saw, felt and experienced them, for this, and only this direct personal portrayal can afford good insight into the personal attitude of the accused and made it possible to give a reliable opinion of his personality. This knowledge is absolutely necessary if the Tribunal is to come to a decision, which is not only in harmony with objective law but which also renders the maximum of justice to the individuality of the perpetrator.

I do not consider it necessary - after the accused was heard so exhaustively on all particulars - to deal with every question, to which he has already given the requisite explanation. In view of this I shall limit the defense to the following statements:

We are in a transitory period of history of the greatest significance. An age is coming to an end which has been less known for its concept of order than

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for its concept of liberty. This striving for liberty released tremendous forces - so gigantic that in the end it was impossible to master them. The tremendous progress this era has unquestionably brought about in scientific and technical spheres we have dearly paid for with the shattering of all human order and the loss of peace in the entire world. So far the profound reasons for such a disastrous development have hardly been discussed in this court. But in order to rightly understand the grave crimes and confusion which are indicted here it is imperative to throw some light on the historical background.

The French Chief prosecutor has already pointed out that the roots of National Socialism are to be found in a period far removed from us. He goes back even right to the beginning of the last century. He sees the first step to a leading astray of the German character in Fichtes "Reden an die deutsche Nation".

Fichte preached the doctrine of "Pan-Germanism" he says, insofar as he wanted to see the world planned and organized by others, just as he himself saw it and would have liked it to be shaped. I cannot understand how this should express more than the universal human desire to take part in the shaping of a common destiny. Only the methods of such attempts to participate may, at times, be justly criticized. A Swiss assertion, which also perceives in Fichte the cause of Germany's going astray, seems to me to be clarifying in this respect. It does not, however, accuse him of Pan-Germanism, that is, of the will to subjugate foreign peoples, but rather reproaches him for having attempted at all, to unite the Germans into one nation. It contends that this was an inadmissible attempt to imitate the French and British, whereas it would have been more suited to the German character to remain a nation made up of different peoples. For only as such could it have continued its historical mission to remain the nucleus of a European federation. Judging by Fichte alone the development is therefore not so easily interpreted.

If one wishes to think historically, one cannot look back and consider Fichte alone. For his "Reden an die deutsch Nation" was only an answer to the "Ruf an Alle" which the French revolution had sent out into the world,

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and they were directly provoked by the appearance of Napoleon. One must go back over the chain of causes and effects to their very beginning. This, the beginning of a national and personal striving for liberty which has characterised the whole of modern times, we find in the Middle Ages.

The colorful play of national and imperial tendencies and struggles which had typified ancient times was overcome by the conception of one eternal omnipotent Christian church. With this a state order superseded the dynamic forces of the time, an order which according to the doctrine of the church was created by the Lord himself and was therefore "full of "God's grace" (von Gottes Gnaden). It strove to enfold universally all of humanity and to lead to peace and rest in God. It was the teachers of the church in the Middle Ages who first ventured to subject war to the principles of law. Prior to that it was taken as a matter of course or a natural phenomenon, like sickness orbad weather, and was often looked upon as a judgment of God. Men like St. Augustine and Thomas Aquinas opposed this conception and declared that one must differentiate between a just and an unjust war. They did this upon the basis and within the framework of a Christian belief, by which God had entrusted mankind with the fulfilment of a moral world order to bind one and all and which would provide the answer to the question of the righteousness or unrighteousness of a war.

When with the Renaissance and the Reformation the spiritual basis of the medieval order was shaken, this development into a universal world peace took on the opposite character. Life, formerly inclindd towards an orderly peace based upon the state, now turned into a torrent which, as it swept over faster through the centuries, gradually grew to the present catastrophe. The individual thirsting for freedom dispensed with the shackles of church and class distinction. The State, declaring itself sovereign, violated the universal order of God as represented by the church. Not recognizing any superior power, it began to conquer as much living space (Lebensraum) as it could on this earth, as long as the stronger will of another nation did not impose any natural barriers on it.

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Peace hence existed only in the naturally rather unstable equilibrium - of powers, obeying only their own laws.

The theory of war as a crime created by Grotius, the teacher of International Law, quoted by the prosecution failed because it was incompatible with the dynamic power of this time. It embodies as we know only an attempt to keep alive through secular arguments the aforementioned concept of Christian warfare. One cannot, however, derive justice from nature alone. It knows no other measure than brute force. It, actually, always decides in favour of the stronger. Considered froma metaphysical standpoint, justice can be defined as an independent force, set above natural impulses. Therefore the theory of Grotius necessarily petered out in the 18th century as thinking in a purely wordly sense it could not find a criterion for a just war.

I shall then skip the following paragraph to save time.

From this time on the search for true justice stirs the world. All socialist theories are only attempts of solving this problem. After having been disappointed by the doctrines of too much liberty, mankind once again seeks security and order. Some wish to return to the Christian truth of God while others want to go forward in order to solve the problem through human intellect eventually.

The National Socialists, whose most revolutionary leaders wanted to go further backwards and at the same time forward to a self-deification of life in a biological political sense, have been conquered and eliminated. Yet a solution of the problems of world order has hitherto not been found. The victorious powers intend to come close to it, however, by drawing a line between themselves and the vanquished through a common indictment and punishment of the same as criminals.

From whence will they take the standard by which to decide about justice and injustice in a legal sense? Insofar as such standards exist by International Law, valid up to now, further statements are not required. That a special court for the trial was created by the Charter of this Tribunal I also do not object to. I must, however, vigorously protest against its use, insofar as it is meant to create a new material law by threatening punishment for crimes which, at the time of their perpetration, at least as far as individuals are concerned, did not carry any punishment.

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I shall then eliminate the following paragraph.

Can one expect, that hereafter punishment will be recognized as just, if the culprit was never aware of it, because at the time he was not threatened with such punishment, and he believed to be able to derive the authorization for his way of acting solely from the political aims pursued? What does a reference to the ethical laws help, if such must be first found again? According to Justice Jackson's opinion, however, the Nazi Government never from the start was the representative of a legitimate state which had pursued the legitimate aims of a member of the international community. Only from such an attitude can the indictment for conspiracy be understood which is to be discussed later. In fact this Indictment is far ahead of its time as is the whole way of argumentation by Justice Jackson. Because internationally recognized standards, outside the positive international law by which the legitimacy of states and of their aims could have been judged did not exist, just as little as an international community as such. Slogans about the legitimacy of one's own and of the illegitimacy of foreign aspirations served only the formation of political fronts just as the efforts to brand political adversaries as disturbers of the peace. In any case they did, indeed, not create law.

Justice Jackson declared justly, that it would have been possible for the conquerors to deal with the conquered as they saw fit. But, said he, non-discriminatory executions or without a final establishment of guilt would be a breach of promise given repeatedly. For that reason he himself proposed judicial proceedings which would have to differ from the ordinary criminal proceeding by not admitting the usual tactics of obstruction and delay by the defendants. But an establishment of guilt should be made, but based on a just and fair trial. If the defendants were the first leaders of a conquered nation which had to answer before the law they were also the first ones to whom the opportunity was given to defend their lives "in the name of justice."

If this sentence is to have a meaning then it must be of significance for interpretation of the Charter. Because it would not be reasonable that the court were obliged to stand exclusively by the charter without taking into consideration international law recognized hitherto and convictions of others

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with regard to law. In that case the judgment would rather become a pure dictate of force to appeal against which "in the name of justice" would make no sense.

The Charter may therefore be applied by the Court only insofar as its decrees are justifiable before the conscience, not only formally but also materially. The Charter itself says that nobody may be excused for a violation of its decrees by hiding behind an order of his government or of a superior. In that case it must apply this, its own logic also to itself by allowing the judge to examine the congruence of its prescripts with the general principles of just ways of thought. For a judge, after all, is far more free and independent ffom the lawmaker than a subaltern from his superior or a subject from his dictator.

Then there is another question, whether really decrees of the Charter are so much in opposition to the previous and ordinary state of law, especially as to the fundamental ideas of all rules of law that the court cannot acknowledge them as right or apply them. Practically the most serious problem consists thereby in the decision what should have precedence in the case of conflict, the Charter or the legal maxim "Nulla poena sine lege praevia."

One has tried to justify the exceptional case of disregarding this rule in this given instant with the highly political charter of the trial. Such a justification, however, cannot possibly be recognized. The political significance of this trial shows itself otherwise by its consequences near and far, but not yet in the very procedure by influencing the legal norms to be applied. A judge should administer law but not deal in politics. He is called upon still less, to rectify mistakes made by the politicians. Punishment, the establishment of which in due time was neglected, may only be decreed by him on the strength of a subsequent law, if he would do this also in other cases, but not only as an exception.

Because, as a principle the maxim of the division of power is supposed to be maintained. By this principle Montesquieu divided the originally united power of the absolute King into legislative, administrative and judiciary. The three different forms of expression of state domination were to have equal rank, to be in equilibrium and so to aid in controlling one another. This system of division of powers characterizes the modern consti-

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tutional state. In a slightly strained way one may define the field of activities and competency of the three different forms of expression of sovereign authority in stating that the legislature has to deal with the future, administration with the present, and judiciary with the past.

The legislature sets the standards to which life is to conform. From time to time these must be changed and put in accord with the changed way of living. But till then they remain valid.

Insofar as a mere establishment of norms of life is not sufficient it will be formed, case by case, by the administration. The administration itself is bound by certain norms, but on principle has free play within the lawful bounds of its good judgment so as to be able to respond to the daily changing needs. For it, just as for the law making politicians, the idea of serving a purpose is decisive.

The judge on the other hand may not decide according to the usefulness but shall decide according to the law. In general, it is not his task to create, but to judge. He has to judge the actions after they were committed and the conditions after they have arisen whether and in how much they corresponded to the standards respectively what juridical consequences they have brought about. Therefore, as a matter of principle his view is directed towards the past. In the life of the state, which is continuously inspired by politicians looking to the future, he is the steadfast counterpole serving as a brake.

Though he is bound by the laws decreed by the politician, he is not merely an executive organ. On the contrary he should control the lawmaker by re-examining the laws with regard to their conforming to the constitution. Therein, in any case, according to reason, would belong the examination whether the principle of the division of powers was maintained. Because just as the judge may judge but "de lege latea" and must leave the decisions "de lege forenda" to the lawmaker, the latter is obliged in reverse not to meddle with the former's competency by giving laws with retroactive power.

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The criticism of the administration of justice of the National Socialist state is mainly based on its having abandoned the division of power. By putting at the top the political leadership idea (Fuehrerprinzip), it meddled despotically with the competency of the judges. By means of the police, i.e. the administration, it arrested and imprisoned people without judicial warrant of arrest only for reason of political prevention, and even arrested others that had been acquitted by the judge and set free. On the other hand for political reasons, convicted criminals were withdrawn from the hands of justice. Thereby quite naturally, safety and clarity of the law were seriously endangered.

I can skip the following paragraph because I shall come back to that principle on another occasion, and I then continue:

A certain degree of protection against arbitrary judgments and the splitting up of law, lay in the fact that the National Socialist State was base on a specific ideology by which the judge was bound.

Concerning the close connection between finding of justice and ideology the SwissProfessor of law Hans Fehr Bern already in 1927 wrote in his book. "Law and Reality; insight into the growth and decay of the forms of law" (Einblick in Werden und Vergehen der Rechtsformen"). He says literally:

"Without ideology law floats in a vacuum...Anyone who has no ideology, can not have a sense of right or wrong either".....

I skip the following paragraphs and continue on the next page.

In contrast to this a decisive ideological base as a foundation of the Charter is not recognizable. As its signatories stand on very different ideological ground we will have to start out in it, as in the international law valid hitherto, from the liberal idea of freedom of ideology. Therefore the legal thesis "Nulla poena sine lege" should be especially sacred for it. This is also proven by the fact that the Control-Council for Germany, by abolishing the criminal analogy of article 2a of the criminal code, brought the above max back again to all Germans most emphatically.

I shall skip the following paragraph and continue.

Nor does an examination of the political aims connected with the Charter help out. Justice Jackson has called the Charter and the Trials a stop in the direction: "To create a juridical guarantee, that who starts a war, will pay

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for it in person". The American commentator Walter Lippmann stated elsewhere, that the system of collective security for the prevention of wars had broken down, because nobody was prepared to declare war on the breaker of peace in order to help prevent a war which did not directly affect him.

The means for combating the disease of war would have been just as bad as the disease itself. In consequence of the fiasco of the collective methods the thought to base security in the future upon holding responsible those individual persons accountable for breaking the peace crystallized with the enemies of Germany in the last war. And so it led to the Nurnberg trial. Taking one's starting point from this fact today one could say: During this second world war revolutionary developments have taken place. It has driven humanity beyond the sphere of what has been the modernage until a short time ago: The first but essential steps to create a world state have been made.

The way to peace, as shown here by Lippmann, will be welcomed on principle, although one still will doubt its absolute reliability. Justice Jackson himself has expressed doubts whether punishment will be a warning and help prevent breaking the peace in the future. Only one who is certain of victory will decide to wage a war and so will not seriously consider punishment which will reach him only in the case of defeat. Therefore the educational issue of this trial, to strengthen the sense of justice, seems more important than the effect of deterring, which can also be achieved by warning for the future. The politician will have to learn that the principle of division of power will also have to be observed by him and that he will not find a judge willing to ment his mistake afterwards by punishing on the basis of future laws. The confidence in international jurisdiction, which today still suffers from the suspicion of being easily misused for political purposes, would be raised considerably through such a decree.

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Therefore even under the view-point of political usefulness the violation of the sentence "Nulla poena sine lege praevia" could not be justified. On the other hand, however, one must realize that the strenghtening in the belief of the inflexibility of justice as the basic pillar of the tremendous dynamic of political forces, serves peace best.

This result can also not be questioned on the basis of the individual considerations presented by the representatives for the defendants.

The French prosecutors have pointed out that an active international law could not be imagined without international morals and that a moral code has to precede all claims for freedom by the individual as well as by the nations. These certainly are facts well worth considering. Correctly considered, however, they speak only for my viewpoint that the strenghtening of the sense of justice must not begin by violating it.

When the French Chief prosecutor declared that in the future there could be no belief in justice by not punishing the Chief culprits of Nazi Germany, then obviously he went too far in the enthusiasm of the speech. Justice does not grow out of obtaining at any price satisfaction for the violated sense of justice. Otherwise we should quickly arrive again at the endless chain of horrors, at vendetta. No-- justice demands moderation and consideration of motives and counter-motives. And there the onesided action itself against members of the Axis powers violates the idea of justice. It is impossible to justify it by a direct violation against it, that is, against the, otherwise, commonly prevailing rule: "Nulla poena sine lege praevia". The British Chief prosecutor himself declared the possibility of subsequent legislature one of the most offensive doctrines of the national socialistic legal terminology. With this he meant that the possibility of punishing an act already marked as a crime does not mean a change of the legal situation but only its logical development, and therefore is permissible. I do not at all want to contest the

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institution of the Tribunal thereby justified by him. Rather the question arises whether this Tribunal is obliged to punish even though no penal law can be found which threatened the offences with punishment at the time of their committment. The affirmation of this question would go much further than the national socialistic judicial procedure which is rejected so vehemently by the British Chief prosecutor.

Moreover he should be prepared to admit that the Charter would have stated clearly and unambiguously, if it did not only presume, but possibly also establish, the basis for the punishableness of acts referred to by it. The passage involved in Paragraph 6 of the charter completely lacks such distinctness. It reads:

"The following acts or any of them are crimes coming within the jurisdiction of the Tribunal."

This may be interpreted in the sense of a mere regulation of competence as well as, even though with difficulty, a regulation first establishing punishableness. Therefore, this passage must in any case be interpreted in favour of the defendant according to the established legal principle "in dubio pro reo", The following phrase,

"for which there shall be individual responsibility"

and the material regulations for punishment quoted in the following paragraphs, present, according to their wording, no reason for doubt as to their interpretations. However, they contain only modifications for an established punishableness. The tribunal may decide whether or not and to what extent they are compatible with the principle "Nulla poena sine lege praevia".

Most difficult for me to understand is the viewpoint of the American prosecutor. On one hand he passionately disavows all legal arbitrariness of the Nazis. On the other hand he is not prepared to acquiesce in the punishment of the defendants only for those crimes which were not only considered punishable at the time of being committed but were also actually threatened with punishment. On one hand he does not want executions or punishment

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without first having accomplished the determination of guilt in a fair manner. On the other hand he demands a strict application of the Charter even though it contains new law surprising the defendants. On one hand he wants the trial to appear to future generations as the fulfilment of the human yearning for justice. On the other hand, in the face of objections to the Charter, he bluntly presumes upon the power of the victorious, who really could have made short work with the defendants.

Now, I skip the next few pages and continue on page 18, second paragraph.

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As far as the political side of this process is concerned I have already stated why it must not exert an influence on the outcome of this trial. I wish to point out here that a policy which is carried out by the victors on the vainquished and therefore may be charactericed as one of "the weakest resistance", has once before proven to be a failure.

Conspiracy

Of the crimes of which the defendants are accused conspiracy is most extensive as regards time and object. Professor Exner, in his capacity as a University teacher of criminal law, occupied himself in particular with the importance of the legal conception for our process. In order to save time by avoiding a duplicate report, Professor Exner has placed the result of his research at my disposal. In conformity with him I have to present the following regarding this question :

The conception "conspiracy" belongs to the Anglo-American law sphere. There, however, it is not at all uncontested, rather, the opinion is noteworthy as being represented in England that this conception is long since obsolete : "It has been said that in England this law has become entirely disused."

In these proceedings, it is a different point that matters. The concept of "Conspiracy", as used by the Prosecution, is entirely unknown to German law. I would like, therefore, to begin my short legal argument with two questions which give rise to doubts.

1) May a criminal procedure, which is bent on realizing justice, use legal concepts which are and always have been utterly alien to the defendants and to the legal trend of thought of their people ?

2) How would this be consistent with the rule : Nullum crimen sine lege praevia, a principle which the British Chief Prosecutor has acknowledged as a fundamental principle of civilized criminal law jurisdiction ? Can it be honestly stated that already before 1939 not only the initiating of an illegal war was held to be an act punishable individually, but moreover a "Conspiracy" for initiating such wars ? The affirmative answer to this question given by the Prosecution has surprised not Germany only. May I clear up, in this connection, a misunderstanding. It has been said that the national socialist state itself had issued criminal laws ignoring the rule :"Nullum crimen sine lege", so that the defendants had no right to invoke this rule. It is by no means my purpose to defend national socialist criminal law, but honesty compels

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me to say : this is an error. The 3rd Reich has - as mentioned before - issued three laws increasing the penalty for an action with retroactive effect by applying the death penalty to acts which carried when committed, prison sentences only.

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However, in no case until now, has a lawful act been declared punishable, nor an act, which was not a crime when committed, retroactively converted into a crime! And this is the case here.

But the charter, which I follow now, has enjoined the use of the concept of "Conspiracy". I do not, therefore, go anyy further into these questions. At any rate, it would appear that if such a concept is to be applied to Germans, this could only be done with all restrictions imposed by equity.

Anglo-American law defines conspiracy as an agreement between a number of persons for accomplishing crimes, "a combination or agreement between two or more persons for accomplishing an unlawful end or a lawful end by unlawful means."

Similar definitions always keep occurring. Two points are charactertistic: "Agreement" and "Common Plan".

Agreement means an explicit or tacit understanding. If some persons pursue the same end independently of one another, then there is no conspiracy. It is accordingly not enough that the plan is common to all of them, they must have knowledge of this community and every one must voluntarily accept the plan as his own. They very expression "to conspire" implies that everyone contributes knowingly and willingly. A person under duress is no conspirator, for duress does not produce agreement, at the utmost, purely external assistance. For instance, if sombody imposes his will on another, then there is no conspiracy. Therefore, a conspiracy with a dictator at its head is a contradiction in itself. A dictator does not enter into a conspiracy with his followers, he does not make any agreement with them, he dictates.

Knowledge and will of the conspirators are aimed at a common plan. The contents of such a plan can be very different. In English law, for instance, conspiracies are known for committing murder, fraud, blackmail, false accusation, certain economic delicts, and so forth. In all these cases, conspiracy is treated as a crime sui generis (by itself), and therefore the conspira-

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tors are punishable for conspiracy regardless of the fact whether a murder, a fraud, or even a mere attempt at such crimes has been committed in the individual case.

According to German terminology, we would say that conspiracy is one of the cases where even preparation of a crime is punishable. Such cases are known to German criminal law. The partner in an agreement for committing a crime against life is punishable. According to Article 49-b he is punishable for a "crime of preparing any killing" even if the intended action has not taken place.

In a certain sense, paragraph 129 can also be applied here. Participation in an association pursuing certain aims hostile to the state is punishable, again independently of the fact whether a crime has actually been committed. But if it comes to an action, everybody is charged with his own culpability in this action. If it happens that the individual conspirator is guilty neither as the perpetrator nor as an abettor nor as an accessory to the actual crime, then he can be charged only with participation in an association hostile to the state, but not with such a crime.

The prosecutors in this trial are going further. They want to punish, under certain circumstances, the conspirators for individual actions they do not participate in.

To take the most significant example: they want to charge a conspirator even with those crimes which were committed prior to his entering the conspiracy.

With the scant material at my disposal, I was not able to find any evidence that this has any foundation in English or American law. One this is certain, however, that such a conclusion is utterly contrary to the German criminal law. For the latter is based on the self-evident and unanimously accepted principle that one is only responsible for an action when one has been the author, or at least the part author of it.

Let us now look at the Charter. The Charter quotes two cases which are declared as punishable and which fall within

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the competence of the Court:

1. Paragraph 6-a states: participation in a common plan or conspiracy for the perpetration of a crime against peace.is As such are listed the planning, preparation, launching and conducting of a war of aggression or of a war involving the violation of international treaties or assurances. It is remarkable that a concept which belongs to the internal criminal and civil law of England and America is applied here, without more ado, to international facts. The Charter does this by treating individuals who plan or conduct illegal wars as gangsters participating in a highway robbery. This is legal audacity, because in this case the sovereign state stands between the individuals, and the result of their actions and this removed any foundation from the comparison with facts in international daily life. Up to now the concept of conspiracy has been unknown to international law.

2. According to article 6, the last paragraph of the Charter, the partners in a conspiracy or in a common plan to commit crimes against peace, the law of war or humanity, are responsible for all actions committed by any partner while executing such a plan. This is, as a matter of principle, quite another thing from the case mentioned in 1. It does not mean punishment of the crime of conspiracy, but responsibility for the individual action of another conspirator. In other words, Conspiracy, as taken here, is not a crime sui generis, but a form of complicity in the actions of the conspirators. Mr. Justice Jackson has given us an example: if three robbers conspire and one of them kills the victim, then all of them, through their complicity, are responsible for the killing.

The case mentioned under 2 is of the greatest importance in this trial. The individual conspirator is to be punished for crimes committed not by himself, but by another conspirator. One defendant, who had nothing to do with the annihilation of the Jews, is to be punished for this crime against humanity only

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because he was a partner in a conspiracy.

The question at issue is: In this trial are principles of responsibility to be applied which go beyond our German criminal law 5 ?

Article 6 of the Charter says that all conspirators are co-responsible for any action committed by any one of the co-conspirators "in execution of such plans". These are the decisive words for the interpretation.

In my opinion, the meaning of these words is as follows: the other conspirators are co-reponsible for any actions of their comrades which form part of the common plan, or which they therefore have helped think out, or have willed or have at least accepted. A few examples:

Case A: A, B, C, and D commit a concerted house-breaking in a villa. They happen to find a girl in the house, and A rapes here. B, C and D cannot be charged for this rape. The reason is that A did not do so, when committing the crime "in execution of the plan" but if anything, at the "occasion of t execution of the plan". The point at issue is not the execution, but merely the occasion arising while executing the plan. This opinion, which sould not be disputed, is of importance as it makes clear that there cannot be any question of responsibility for all the actions of the partners to the conspiracy.

Case B: Whil exploring the villa, B and C come to fight abaut same piece of plunder, and B knocks down C. This action too was not committed "in execution of the plan", but was foreign to the plan. A and D are not responsible for this "excess".

The third case: While exploring the villa, the burglars are detected by the owner. D. shoots him. Now the issue depends on the special circumstances of the case. Let us, for instance, go back to the example, quoted by Mr. Justice Jackson, of the three robbers, one of whom kills the victim. Considering the nature of American gangsterism, it would appear quite normal that the individual gangsters concerned bore in mind the possibility of such an occurence, and were quite prepared to approve of it. If

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this is the case, they are responsible for the killing, as accessories or assitants, also according to our opinion. In such a case, there would be no objection to Mr. Justice Jackson's solution. But if the case is different, if the fatal issue had not been forseen by the others, perhaps could not be foreseen--e.g., if they took it for granted that the inhabitants of the house were away from home--then there is no responsibility fof the co-conspirators. They are responsible only for acts belonging to the "execution of the plan". The common plan, however, includes only what has been foreseen, from the beginning, and approved. Other ways of execution are alien to the plan.

Mr. Justice Jackson's argumentation is fallacious in so far as he derives a common principle from a decision which clearly and obviously happens to apply to the "normal case" of his paradigm of the robbers, and can hardly be applied to any other case. As the case stands, co-responsibility of any single act could be made to apply to those conspirators only who have foreseen and approved of their comrades' act.

A legal principle extending the fellow-conspirator's responsibility to such cases as are not included in their common responsibility, is alien to German law. Whether or not it belongs to Anglo-American law, the application of such a principle in the present trial would make punishable acts, which heretofore, could not be punished. This would clearly contradict the rule: nullum crimen sine lege praevia, a principle, as previously emphasized, acknowledged explicitly by the British prosecutor too. In view of the fact that article 6 can be interpreted in various ways, we should select out of two possible interpretations, as corresponding to the author's will, the one which does not contradict the said principle.

There exists a withdrawal from a conspiracy, and also a subsequent entrance into it. The question is: What about responsibility for acts committed during the period of non-membership? The prosecution appears to be of the opinion that a per-

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son entering into the conspiracy hereby approves anything previously done by any conspirator, in pursuance of the common plan. Such an assertion seems to arise out of the civil law theory of a subsequent ratification of a business transaction. This theory is not tenable in criminal law. The charter does not mention anything of the sort as the common plan, the execution of which involved the act which was common to those who were members at that time. Even if one takes the act of joining the conspiracy to be an approval of its acts so far committed, the approval of a commited crime does not involve partnership in this crime.

The person joining later has nothing to do with these crimes. The same applies to the withdrawal from the conspiracy. The person withdrawing can be made responsible only for what happened during his membership, even if the result has occurred after his withdrawal. Again any other opinion would lead to the result that an ex post facto law is being applied in a conspiracy within the meaning of the indictment, viz. a conspiracy to commit crimes against Peace, Usages of war and Humanity?

If such a conspiracy had existed, then Hitler would have been - nobody doubts it - the leader of these conspirators. But it has already been emphasized that a conspiracy headed by a Dictator is a contradiction in itself. Hitler would have laughed if it had been said of him that he had made an agreement with his ministers, partly leaders and generals, to wage this or that war, or to conduct the war by these or other means. He was an autocrat. He did not care for the approval of these men, but was merely concerned about having his decisions executed, whether they agreed to these decisions or not. Quite aside from legal considerations, Hitler's environment, in fact, was quite different from a community of conspirators, as considered by the prosecution, and that before the hearing of evidence. Apaprt from a small party clan, he was surrounded by an atmosphere of distrust. He trusted neither the "defeatist club" of his ministers, nor his "generals". Such was already the case

before the war, and what his surroundings looked like during the war has been shown by witnesses with great impressiveness. A cunning system of secrecy ensured that plans and aims of the Fuehrer's remained unknown to his collaborators as long as at all possible, so that his most intimate assistants time and again were taken by surprise by the events, and, in fact, were shocked to learn some of them at the present trial only. This system of secrecy also ensured an isolation of his individual collaborators, as one hand was not allowed to know what the other did. Does this look like a conspiracy? In fact, Hitler complained at times that the generals were "conspiring" against him, and used, strangely, this very word while speaking of those who today are charged with having conspired with him. The evidence repeatedly mentions conspirations, but conspirations against Hitler.

From a purely psychological point of view, it is, to say the least, highly imporobable that the score of survivors of the Third Reich picked out and put into the dock by the prosecution, have ever formed a gang of conspirators in the sense of the indictment. Any homogeneity is lacking in this group of people as to outlook, background, education, social position and function, and some of the defendants only not in the dock.

The prosecution considers the Party with its organizations as the nucleus around which the conspiracy formed.

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We should however, in this connection, too, consider the different individual attitude. Some of the defendants have not been party members at all, or, at any rate, not for a long time, and but few of them have played an important part in the party. Some held top positions in the party and its organization and devoted their entire activity to the aims of these organizations, awhile others did everything in their power to eliminate from their spheres of activity any influence of party and SS.

The foundation of the NSDAP took place in a period of utter powerlessness of the state and of general war-weariness of the people at a time when, truly, no intelligent person thought of a second war or, even less, about a war of aggression.

But were any of the defendants' aims unattainable without war?

Surely, the wishful dream of every true German was the union of all adjoining German territory with the Reich. This applied to the Saar territory, Austria, Memel, Danzig, and, as a hope lingering in the far future, also to the Sudeten territory. They all had been in the past parts of the German Reich, they all would have already returned to the German Reich in 1919 if the right of self-determination solemnly promised to all peoples had been realized. But these objectives of German longing could be reached by peaceful means. And in fact, they have been reached without a shot or a stroke with the one exception of Danzig, which would have been done in the same peaceful way if the Fuehrer had had a spark of patience and the Poles a spark of goodwill. But they neither wanted nor believed in a war. Hitler was believed capable of a large-scale bluff, but not a launching the catastrophe of a war.

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I cannot therefore, believe in a conspiracy to commit crimes against Peace and usages of war. May I add two points of general importance :

1) The first point refers to Goering's attitude previous immediately to t. outbreak of war. He was at that time Hitler's confident friend, the country's second man, and is now the chief figure among the defendants. If there had been, in truth, a conspiracy to launch wars of aggression at that time, then he would have been the second in importance in such a conspiracy but it was actually he who tried everything within his power, in the last day of August, 1939, to prevent the attack on Poland, and who tried behind Hitler s back to uphold peace. How would this be consistent with a conspiracy for initiating wars of aggression ? Nor did he agree with a war against Russia and he strongly dissuaded the Fuehrer of such a war.

2) If there had been a conspiracy to commit war crimes, then the war would have been waged, from the beginning, with utter ruthlessness and disregard of rules of war. Just the contrary actually happened. In fact, in the first years of the war, international law was, on the whole, respected. Especially in the beginning one endeavoured to wage war with decorum and chivalry. If any evidence is needed, a look into the orders of the German High Command regulating the behaviour of the soldiers in Norway, Belgium, Holland is sufficient proof.

THE MARSHAL: The Tribunal adjourned until tomorrow.

(The Tribunal adjourned until 5 July 1946, at 1000 hours.)